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# **ELEMENTS** **OF** **DIAN MERCANTILE LAW** **INCLUDING** **INDUSTRIAL LAW**

BY  
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## PREFACE TO THE TENTH EDITION

The Tenth Edition has also been revised as usual with a view to meet the requirements of the Syllabuses of Professional and University Examinations as suggested by Examination papers and revised syllabuses. The Indian Insurance has been dealt with in great detail. Common Carriers Law, including Carriage by Land and Air have been dealt with in separate chapter entitled "Common Carriers and Carriage Goods by Land and Sea". New Indian Arbitration Act of 1908 replaces the old; Provincial Insolvency Act also forms part of the Chapter on "Insolvency Law", and a separate chapter deals with "Trade Marks, Designs, Patents and Copyright". Industrial Law Chapter also includes Payment of Wages Act of 1936.

The author takes this opportunity to thank the professors and teachers of the subject once again, for their kind appreciation of the utility of this little book and expresses his gratitude for many useful suggestions received from them. The author also trusts that the same encouragement will continue from his colleagues in the professional line.

The author's thanks are also due to his daughter Miss Orshed S. Davar, LL.B., and Finalist of Chartered Institute of Secretaries (London), for assistance in the revision of this edition and to his son Rustom S. Davar, Finalist of the Incorporation of Certified Secretaries (London), for preparing the index.

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# ELEMENTS OF INDIAN MERCANTILE LAW INCLUDING INDUSTRIAL LAW

## CHAPTER I

### SOURCES OF INDIAN MERCANTILE LAW

MERCANTILE Law means that branch of Law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions. Some authors define it as a branch of Law concerned with business, trade and commerce. A good portion of this branch of Law arises from the practices and usages of the mercantile community, as we shall see later in this chapter.

Indian Mercantile Law is adapted from English Common Law, Equity and Statute Law, so far as it is applicable to Indian conditions.

It is incorporated in a number of Indian Acts and Enactments which mostly follow the English Law on the subject with some important modifications.

English Law is made up of (1) the Statute Law, i.e. the Law made by Parliament, (2) Common Law; and (3) Equity including Judge-made Law. It has also been influenced by the old Roman Law and the mediæval Law Merchant, as well as by the foreign Codes of Law and the customs of merchants of modern times.

#### Common Law

Common Law is the oldest "unwritten" law and is called "unwritten" because it is not written in any enactments or statutes but is to be found only in ancient treatises and in the decisions of judges. This law was based upon customs and practices handed down from generation to generation. In fact prior to 1066, i.e. the Norman Conquest, the laws and customs of England were not uniform and the customs of a centre like Yorkshire were mostly unknown in Hampshire. Justice according to these local customs was dispensed in local courts and the courts themselves were disconnected and thus there was more or less uncertainty and confusion until the period when the whole kingdom gradually became consolidated. This consolidation came about as some of the itinerant judges by the King at Westminster began to travel throughout the country.



### *Indian Mercantile Law*

what are now called circuits in order to hold courts from place to place, hear cases and administer justice. As these visits became frequent the local courts gradually began to lose their importance, declined and ultimately disappeared with the result that the Law enforced at Westminster became the law of the whole country. The English judges played a very paramount part in developing the Common Law of England through their judgments. The old theory of English Law happens to be that all Law flows through the King. The King in his turn appointed judges to whom he entrusted, or so to say transferred his authority to pronounce judgments, which judgments became precedents which were followed by generations of judges and thus Common Law gradually expanded. Fortunately for England, the judges from early days were given a complete and independent authority and among them England had the good fortune to possess a large number of really learned men who gave the full benefit of their learning to the expansion of this branch of Law while dealing with every transaction that came before them with logical arguments on doubts arising from the basic principles of Common Law. The English judges have been always safeguarded in connection with their appointments, and the Act of Settlement of 1701 lays down that they can only be removed from their office by means of a joint address of both the Houses of Parliament to the King and it has also been laid down that no action can be brought against them for anything they might say or do in the execution of their judicial duties. Even the salaries paid to judges are not subject to annual revision by vote in Parliament with the result that, largely speaking, they are immune from criticism in the House of Commons. Those salaries are charged upon the Consolidated Fund. The law which thus grows on the decisions of the judges both in connection with the Common Law or any other branch of law is called "Case Law". This Case Law is binding on all Courts having jurisdiction inferior to that of the Court which gave the judgment, and even in the case of those of equal jurisdiction, the usual and universal practice, with rare exceptions, is to follow the earlier decisions which have been time honoured and are of long standing. It is said that by the reign of Henry III, the Common Law became more uniform and organized. During the early period when Common Law was paramount, little attention was paid to trade and business with the result that the early statutes passed by Parliament mostly dealt with land matters. Common Law has been in force all over England prior to the origin of Parliament. In the reign of George III, however, Lord Chief Justice Mansfield, by recognizing the various customs of traders in a series of carefully reasoned judgments, laid the foundation of the modern Mercantile Law. Prior to this, in the reign of Queen Anne, Lord Chief Justice Holt also rendered a similar service, though to a lesser degree.

### **Law of Equity**

Equity grew up later as compared with Common Law. Common Law did not provide for various transactions such as trusts, mortgages, partnerships, etc and these points gradually came to be taken up by the Lord Chancellors who established various rules based upon reason and natural right, i.e. equity, which grew up into a system. Later on Courts of Chancery were established which administered the Law of Equity. The Law of Equity as administered by the early Courts of Chancery came in as a sort of relief to those suitors who could not get adequate relief or remedy under the Common Law from the common law judges. In the early days the equity rules were not uniform as different Lord Chancellors who presided over these courts took a differing view as to the law of Equity and good conscience but these rules were made more or less uniform by laying down a set of principles on which Equity Courts had to act during the term of office of Cardinal Wolsey as Lord Chancellor during the reign of Henry VIII. The Chancery Court administering justice on the principles of the rules of Equity remained distinct and separate from the Court of King's Bench which administered justice according to the Common Law until the passing of the Judicature Acts of 1873 and 1875, after that these Courts were amalgamated and made into various divisions of one High Court of Justice.

### **Statute Law**

Parliament came in later with statutes consolidating and codifying the law, thus creating what is known as the Statute Law. These statutes enacted by Parliament rank in priority to Common Law and Equity as Parliament is the supreme legislative body.

### **Establishment of High Courts in India**

In India the Charter of the eighteenth century established Courts of Justice in Bombay, Madras and Calcutta, and introduced English Common and Statute Laws then in force in England. It was soon found undesirable as well as inconvenient to have to apply an entirely foreign system of law to a people in a different condition of society. The Courts at Calcutta, Madras and Bombay were empowered in 1781 and 1797, respectively, to apply Hindu and Mahomedan Laws. It was arranged, for example, that if a dispute arose between two or more Hindu litigants in the matter of contracts, the Hindu Law of Contracts was to be applied, whereas in the case of Mahomedans, the Mahomedan Law was to be enforced. If, on the other hand, one of the parties was a Hindu and the other a Mahomedan, the law applicable to the defendant had to be considered in deciding the suit.

In 1862 High Courts were established for each of the three Presidency towns of Calcutta, Madras and Bombay, which Courts comprised an

## *Indian Mercantile Law*

apply the Hindu and Mahomedan Laws to Contracts until 1872 when the Indian Contract Act was passed. The Contract Act of 1872 repealed the various statutes as given in the Schedule to that Act, and it superseded all usages and customs which were not consistent with the Act. The Contract Act has been drastically modified, inasmuch as chapters dealing with Sale of Goods Law and Partnership Law, viz. Chapters VII and XI have been superseded by the Indian Sale of Goods Act of 1930 and the Indian Partnership Act of 1932. For each of these Acts special chapters have been devoted in this text. The contracts which are not governed by the Indian Contract Act are governed by the following Enactments besides the last named two Acts :—

1. Act of 1856 with regard to Bills of Lading.
2. Act of 1839 with regard to Interest.
3. Act of 1859 with regard to Breaches of Contract by Artificers.
4. Act of 1865 with regard to Common Carriers.
5. Act of 1883 with regard to Seamen's Wages.
6. Act of 1890 with regard to Railways.
7. Act of 1881 with regard to Negotiable Instruments.

The Contract Act is not an all-embracing Act. It only purports to "define and amend certain parts of the law relating to contracts." These principles were introduced into this Act after careful deliberation and taking into consideration the special conditions applicable to India. It further leaves all the usages and customs not inconsistent with the Act, unaffected, and, therefore, they will naturally be considered in deciding cases. In cases not provided for by the Contract Act or any other enactment, the indigenous Law of Contracts can still be drawn upon by High Courts. As an illustration, the Hindu Law rule of *damduput* by which interest should not exceed the principal is still in application in the Presidency of Bombay and the town of Calcutta but not in the Presidency of Madras.

The other Acts, viz. the Companies Act, the Negotiable Instruments Act, the Indian Arbitration Act, etc., dealt with in this book, were enacted from time to time and modified as occasion demanded.

### ✓ Mercantile Person

A mercantile person is a person who carries on commercial transactions and may be a single individual or a sole trader or a partnership or a company.

### The Law Merchant

The Law Merchant or *lex mercatoria* is a collection of legal principles which grew up in course of time with the progress of trade and commerce in England. Its basis was the custom and practice of merchants. At first it was dealt with separately in district courts but eventually it became part of the English Common Law. Besides the customs and usages of merchants as referred to above, a good deal

had to be drawn from foreign treaties in the course of the growth of this branch of law. Thus it will be noticed that a portion of the law merchant of England was derived from foreign sources. Some was adopted from the Roman Law and particularly the customs and practices concerning maritime commerce were adopted from those prevailing in the leading cities of southern Europe at different periods of history. While dealing with the exact position, historical and legal, which the Law Merchant or *lex mercatoria* occupies in English jurisprudence, Chief Justice Cockburn in *Goodwin v Roberts*, (1875) L.R. 10 Exch. 337, stated on page 346 to the effect that the Law Merchant was not a fixed and stereotyped branch of law, which was incapable of being expanded and enlarged so as to meet the wants and requirements in the varying circumstances of Commerce. His Lordship further added, "It is true that the Law Merchant is sometimes spoken of as a fixed body of law, forming part of the Common Law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The Law Merchant as sometimes spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well known principles of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become ingrafted upon, or incorporated into, the Common Law, and may be said to form part of it." At the earliest stage the English judges showed considerable disinclination towards the adaptation of foreign usages and customs but gradually as lawyers of newer schools succeeded them as judges a more developed outlook was taken. In the reign of Queen Anne, Chief Justice Lord Holt was the first great judge of England who began to recognize the customs and practices of European merchants on the continent, though to a limited degree. He, for example, refused to admit or follow the custom of merchants as to the negotiability of promissory notes with the result that the great inconvenience suffered by merchants had to be removed through the passing of an Act of Parliament known as Statute 3 and 4 Anne, Ch 9, whereby today the promissory note is negotiable and can also be made payable to bearer. Prior to the passing of this Act a series of judgments were given by Lord Holt declaring them not negotiable. Later on between the years 1704 and 1793, i.e. during the period of office of another great judge, the

Lord Chief Justice Mansfield who came to be called the father of English Mercantile Law, the greatest possible progress was made in connection with the expansion of English Mercantile Law or the *lex mercatoria*. Lord Justice Mansfield had the advantage of being able to read and write foreign European languages and thus he was able to make a close study of the various books written by law writers of the continent of Europe at different centres and during different periods with the result that he was thus able to appreciate the customs and practices of English merchants which were largely influenced through the foreign centres, as trade and commerce in earlier days was mostly in the hands of continental merchants and England was gradually beginning to come in the line with the development of its indigenous trade and commerce in the hands of indigenous businessmen. He thus largely expanded and enriched *lex mercatoria* in his own country in a series of most learned and well reasoned judgments which constitute, even to this day, the foundation on which the whole structure of the mercantile law of England has been built.

The usage as applicable to the Law Merchant may not necessarily be ancient, but provided it is general, a modern usage may be made part of this branch of law. It will thus be noticed that the Law Merchant is an ever-growing branch of law expanding and modifying itself—of course with certain limitations—with the changing circumstances of trade and commerce. In India, the Law Merchant being mostly codified, the Courts have primarily to interpret the language of the codified Act, but as these codifications do not claim to embrace all the principles, in cases where some principles are not expressly dealt with in an Act, or where there is some doubt as to their interpretation, or in cases where certain branches of the Law Merchant, such as the principles of the Law of Insurance, are not codified at all, the Courts in India are generally guided by English authorities.

## CHAPTER II

### AGREEMENTS

#### An Offer and an Acceptance

An offer and an acceptance by which the parties agree to do, or to abstain from doing, a particular act, constitute an agreement, e.g. A says to B, "Will you buy my watch for Rs. 300?" and B replies "Yes" there is then an agreement. This offer may have been made by word of mouth or by a letter and the acceptance may have been communicated by either of these methods. Thus through this express offer and express acceptance, an express simple agreement has been entered into and is known as an agreement by offer and acceptance. However, in order to make a contract of this class, both the parties must be *ad idem*, i.e. in absolute agreement as to what they are doing and if that is so and such an agreement is supported by consideration, as we shall see later, there is a binding contract between them. It may be that after this formal offer and acceptance either by word of mouth or by writing, an additional formal agreement in writing is entered into by businessmen in a separate document signed by the parties in which case the formal agreement becomes the agreement of the parties, but if on the other hand no such formal agreement is entered into, the offer and acceptance and all other negotiations leading to the acceptance remain the evidence of agreement between the parties. But where there is a formal agreement made and signed, all correspondence or negotiation that has taken place before the signing of the formal agreement cease to be operative and cannot be brought into evidence in case of dispute, but the parties will have to fight their case on the construction of the language of the formal agreement. In other words the formal agreement in such a case becomes the final agreement of the parties in the eyes of law. Sometimes the acceptance is accompanied by a statement that the acceptor desires the offer to be put into some formal shape. This will not of itself render the agreement already made unenforceable—the question is one of intention—if the intention is that the agreement shall ultimately be reduced to writing and that it shall not be binding until that has been done, there is no contract until the agreement has been put into writing. If, however, the intention is merely to preserve a memorial of an agreement already verbally made, there is a contract as soon as all the terms which are to be put into writing are agreed upon. The offer or acceptance may also be implied from conduct, e.g. A offers to buy B's horse for Rs. 500, B can accept this offer by sending the horse itself. By running tramcars over our roads the Tramway Co. impliedly offers to carry

passengers from one place to another for a fixed hire. The purchase of a ticket would amount to an acceptance of that offer, and so on

### **Mere Declaration of Intention to Offer**

While considering the subject of offer and acceptance it should be noted that an offer must be distinguished from what is known as "a mere declaration of intention, i.e. only an intention to give an offer." If the statement is a mere intention to give an offer, naturally it has not been intended that it should be accepted and thus its acceptance cannot constitute an agreement. Thus in one case an auction sale was advertised whereupon the plaintiff travelled a distance to attend the sale with a view to buy the article. On his arrival he found that the sale was cancelled on which he sued the auctioneer for breach of contract on the ground that the advertisement was an offer made to the public which he accepted by travelling to London. The Court held that the advertisement was merely a declaration of intention and could not be in acceptance. Thus whether a particular statement is in actual offer or only an intention to offer is a question of fact which the Court alone can decide looking to the circumstances of the case.

### **Invitation to Make an Offer**

The other position to be considered and distinguished is an invitation to make an offer from an offer. This distinction again depends upon the intention of the parties, which in doubtful cases can only be determined after considering the nature of the transaction and the circumstances of the case. If tenders are invited for supply of a particular article, it is quite clear that there is no offer from the party who invites the tender but on the contrary the persons intending to tender are expected to give offers to the party advertising for tenders and it is for the latter to decide which offer if at all to accept. On the same principle it has been held that a catalogue or price list stating prices at which a shopkeeper is prepared to sell, or goods displayed in a window with price list tickets on them are not offers for sale by the shopkeeper but are only an indication of the shopkeeper's intention to consider offers from members of the public. Thus they are so many invitations to the public to offer which may or may not be accepted.

Our Contract Act defines an agreement as "Every promise and every set of promises, forming the consideration for each other." [Sec 2 (e)]

### **Offer or Proposal, Acceptance and Revocation**

A proposal is complete the moment it comes to the knowledge of the person to whom it is made.

The acceptance of a proposal is complete, as far as the proposer is concerned, as soon as it is put in course of transmission to him

so as to be out of the power of the acceptor to withdraw the offer; it is, however, complete as against the acceptor as soon as it comes to the knowledge of the proposer.

For example, A sends an offer or proposal to B by a letter. This proposal is complete as soon as the letter reaches B. If now B wishes to accept this proposal and replies by letter accepting this offer, this acceptance becomes complete and binding on A as soon as the letter reaches him.)

In English Law, however, the rule is that the acceptance is complete as soon as it is sent out by the acceptor, although the same may not come to the knowledge of the offerer, i.e. as soon as it is put in a regular course of transmission. As this is the rule, if a person were to accept an offer and post the letter of acceptance, he cannot revoke the said acceptance by a telegram in England, even though the telegram reaches the offerer earlier than the letter of acceptance, as he can do in India under the Indian Law.

This rule applies even in cases where the letter—though correctly addressed—gets lost in the course of transmission.

It has been held in *Carlill v Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256 that the proposal need not be made to any particular person but may be made to the general public, but if it is accepted by any particular person the same would constitute an agreement, provided of course all conditions precedent to such acceptance were fulfilled. Here the defendants who prepared a medical preparation called, "Carbolic Smoke Ball" advertised it, offering to give £100 reward to any person who should contract influenza, cold, etc., after having used the ball three times duly for two weeks. The plaintiff bought this medicine on the faith of these advertisements and used it in the manner and for the period specified, but nevertheless contracted influenza. It was held that all the elements which are necessary to form a binding contract enforceable in law were there and that the plaintiff was entitled to £100 as stated in the advertisement. The same rule would apply to an advertisement offering a specific reward for a lost dog to the finder.

The revocation of a proposal is complete only when the person to whom it is made comes to know of it before accepting it, but as against the person who makes it, when it is put into the course of transmission to the person to whom it is made so as to put it out of the power of the person who makes it (Secs 4 and 5). This is because the person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that he has withdrawn it.

The acceptance of an offer must be absolute and unqualified [Sec. 7 (1)]. An acceptance with a variation is no acceptance but a mere counter-offer, which may or may not be accepted by the person who originally sent the offer. In one case an offer or proposal was sent for "good" barley by A, and B accepted the offer in the



identical terms, but used the word "fine" barley, instead of "good" barley, in his letter of acceptance; it was proved that the expressions "good" and "fine" barley respectively stood for two different qualities; it was held that the acceptance was not an acceptance of that which was offered. On the same principle if the offer states that the goods should be delivered at a particular place, delivery at some other place is no performance of the agreement.

Section 7 (2) further lays down that the acceptance should be expressed in some "usual and reasonable manner," and it further states that if the proposer "prescribes the manner in which it is to be accepted," then the acceptance must be made in that manner, e.g. if a proposal is received through the post in the usual course it will be taken for granted that the acceptance in the "usual and reasonable manner" may be made by a letter in reply, through the post, within a reasonable time. If, on the other hand, the proposer in his letter has asked for an acceptance by wire the "prescribed manner in which it should be accepted" is by wire.

With regard to an offer or proposal it sometimes happens that the proposer prescribes a particular date on or before which his offer may be accepted. This promise to wait is, however, not binding on the proposer for want of consideration and may be withdrawn before expiration of the time promised. [For example, A has a horse to sell and offers the same for sale to B for Rs. 800, promising at the same time that he would wait for two days. Before the expiry of these two days, A meets C to whom he offers the same horse and C accepts the offer, takes the horse, and pays the money. A immediately communicates to B his revocation and if that revocation reaches B before B accepts the original offer, A's act is quite in order; but if B has posted his letter of acceptance before receiving A's revocation, B's acceptance is binding on A, and A will have sold his horse twice over. In this case A would have to pay damages to one of the parties for not keeping the contract.]

The other point to be noted with regard to a proposal is that in case no time for acceptance is stipulated, it must be accepted within a reasonable time; if not, the proposal lapses as a matter of course and cannot be accepted thereafter. What is a reasonable time would, as usual, depend upon the circumstances of each case. If, however, the acceptance is misdirected through the fault of the acceptor, it will not be considered to have been regularly put in course of transmission and consequently would not be binding on the proposer, e.g. where instead of writing "Bombay" in the address the acceptor, or his clerk, writes "Lahore". But if the proposer himself gave a wrong address and that address was used by the acceptor, the acceptance would be regular.

*Revocation of an offer or proposal may be made in one or more of the following ways according to Section 6 of the Contract Act —*

- (a) By communication of notice of revocation by the proposer to the other party.
- (b) By failure of the acceptor to fulfil a condition precedent to acceptance.
- (c) By death or insanity of the proposer, if the fact of this death or insanity comes to the knowledge of the acceptor before acceptance.

To put it briefly, an offer may be revoked at any time before acceptance and it becomes irrevocable after the acceptance is communicated and made known to the offerer.

### Communication and Acceptance of Special Conditions

Cases frequently arise where, in cases of contract, special conditions are printed at the back of the document, which conditions one party attempts to make binding on the other, e.g. a ticket or a pass having a number of conditions on the back of it. How far these conditions are binding will depend on whether or not the person taking such a ticket had notice of the conditions. This rule would apply to a consignment note or a cloak room receipt on the back of which conditions are printed. However, if the party can prove, fraud or satisfy the Court that the conditions, as printed on the face of the ticket, were not clear or were misleading, he will succeed. To summarise, in such cases (1) where the party receiving a written or printed document knew the conditions contained in the document, he will be bound by it; (2) if he did not know of the writings contained in the document, but the opposite party had given sufficient notice to him that the document contained such conditions, the receiver will be bound by it; and (3) if the document with conditions was handed after the contract was completed, it would not be binding at all. The notice as to these special conditions must be given on the face of the ticket by printing in such a manner as to give reasonable notice on the face of it as to the conditions at the back of the document. In one case where the ticket bore the words printed in red letters on the face of it to the effect that the same was issued subject to the conditions at the back, it was held that it was no excuse that the conditions were in the French language because the plaintiff had sufficient notice as to the conditions and it was his duty to make himself acquainted with them. [*Mackillican v. Compagnie de Messageries Maritimes de France*, (1889) 6 Cal. 227.] The acceptance of a document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of more or less usual kind. (*Gibbard v. G. E. R. Co.*, (1920) 3 K.B. 689.)

### Continuous or Standing Offer

If an offer is given to supply a certain class of goods within the year at a certain price upto a certain quantity, or even upto the

quantity ordered, it is not an agreement but only a standing offer. The agreement is brought into existence every time the other side orders quantities at that price and thus accepts the offer. Thus when A agrees to supply coal to B at a certain price upto a certain quantity which may be required during the year it is not a contract but a standing offer unless B binds himself to take a certain quantity. A can withdraw his offer otherwise for the quantity that may not have been ordered at the time.

### Lapse of Offer

Generally when an offer is given, a time is indicated within which the same has to be accepted. In such a case, on the expiry of the time, the offer automatically lapses. If no time limit is fixed the offer may lapse after a reasonable time or may be cancelled before the acceptance is put in course of transmission. It will thus be seen that an offer lapses under the following circumstances —

- (1) when a time limit is fixed, after the expiry of that time;
- (2) when a time limit is fixed but before the expiry of the time, if the offerer withdraws or revokes the offer and the person to whom the offer is given has not accepted it before the revocation reaches him;
- (3) if the offer is not made with a time limit, it expires after the expiration of a reasonable time,
- (4) the death of the offerer or of the offeree puts an end to the offer;
- (5) if acceptance is required to be made in a stipulated manner by the offerer and the party offered fails to adopt that mode.

### What are not Implied Offers

A few illustrative cases may be considered here on this question. A Railway Company's time table is taken as an offer on the footing of which a passenger purchases the ticket, but nowadays most Railway Company time-tables contain a clause to the effect that the company will not be liable for any change in timings, etc., whereas an invitation of tenders for the purchase of an article is not an offer, but only an invitation for offers. A price list or catalogue, generally speaking, is not an offer by the firm issuing it but there should be an indication that offers to purchase at the prices indicated will be considered. Of course much will depend on the usage of business. On the same principle it has been held that prices marked on articles displayed in a shop are not offers, but indications that the shop keeper is prepared to consider offers from prospective customers at those prices.

## CHAPTER III

### CONTRACTS

All agreements are not enforceable at law. Agreements which are enforceable at law are called contracts. Agreements which are not enforceable at law may be either (1) void, or (2) voidable. An agreement which is not enforceable at law by either of the parties is "void", whereas one which is enforceable at the option of one or more of the parties thereto, but not at the option of the other or others is 'voidable'.

#### Agreement

The three requisites for a valid agreement are that—

- (1) the parties to the agreement shall have the legal capacity to enter into agreements;
- (2) the agreement is made for a legal purpose and is not in its effect opposed to public policy, and
- (3) it is made in a proper form or is supported by consideration.

#### I. PARTIES SHOULD HAVE THE LEGAL CAPACITY TO ENTER INTO AGREEMENTS

Every person capable of entering into a contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

If a person incapable of entering into a contract, or anyone whom he is lawfully bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such necessaries is entitled to be reimbursed from the property of such incapable person." (Sec 68)

#### A Minor or an Infant

A person who is under 21 years of age is an infant in English Law, whereas a person domiciled in British India shall be deemed to have attained his majority when he shall have completed the age of 18 years, according to the Indian Majority Act.

If, however, in the case of a minor in India, a guardian has been appointed before the completion of eighteen years, or his property is placed under the superintendence of a Court of Wards before that age, the age of majority will be attained on the minor completing the age of twenty one years.

An infant cannot enter into valid contracts for the loan of money, for the purchase and sale of goods or property for profit, but he can enter into contracts for necessities of life or for his advantage.

or benefit and bind his property (Sec 68). The necessities of life depend on the position in life of the infant. Food and clothing may be taken as simple examples of necessities, but that may be extended according to the station in life of the minor. The necessities should not only be such as a person in the position of the minor may want for ordinary use, but must also be those that the minor actually needs. He cannot actually need things with which he is already abundantly supplied. In the case of a young aristocrat, the necessities of life may include a horse, carriage or a motor car, regimental uniforms and decorations, livery and servants suitable to the position in life of the minor. But luxuries such as cigars and jewels are held not to be necessities of life even in the case of a young man of large fortune. In the case of necessities, in India a minor's property is liable, there is no personal liability. A watch is held to be a necessity of life, but its value must have some bearing on the position in life of the infant. It should be further remembered that in strict law an infant is incapable of making a contract of purchase at all and hence there cannot be any liability for goods supplied but as has been laid down in *Nash v Inman*, (1908) 2 K B 1 on page 8 "if a man satisfies the needs of an infant by supplying to him necessities, the law will imply an obligation to repay him for services so rendered and will enforce the obligation against the estate of the infant." Thus it will be seen that it is not exactly a direct liability to pay but a sort of a quasi-contractual obligation imposed by law owing to the peculiar nature of the circumstances. Again if an infant enters into a contract to purchase necessities, the said contract will not be binding on him under the Sale of Goods Act, because the Sale of Goods Act clearly states that he would be only liable for necessities sold and delivered to him. The necessities would also include the infant's lodging expense as well as necessities for himself and his wife, medical attendance as well as the funeral expenses for either and actually necessary expenses for travelling and conveyance. If a loan is given to an infant in order to help him to buy necessities or in case necessities are purchased by a third party for him at the infant's request, the infant would be bound to pay just as if he had himself purchased the necessities. The infant would also be bound by an agreement made by him to serve for a wage provided in the opinion of the Court such an agreement was for his benefit. In deciding this issue, the Court will take the whole agreement as it stands in consideration and then decide and will not refuse simply because some of the stipulations seem to be unavoidable. The same rule will apply in the case of contracts of apprenticeship. If, however, a contract of service is not reasonable and not for the infant's benefit, the Court will refuse to enforce it. If, however, the contract contains stipulations which are unreasonable, being in restraint of trade, the Court will consider whether these objectionable stipulations are separable and, if so, will enforce against the infant the contract minus the objectionable stipulations. In other words,

If the Court will reject the objectionable stipulations by separating them from the contract and the rest of the contract will stand good. It has also been said that in a case of apprenticeship he can be sued for the payment of a reasonable premium which may have been agreed to, when he comes of age and also in connection with any reasonable restriction which might have been incorporated in the contract of his apprenticeship to the effect that he would not compete in business after his apprenticeship ceases.

An infant or minor can hold shares in a company but care should be taken not to allot the shares or transfer to him shares which are not fully paid, for the simple reason that the infant can repudiate his membership either during his infancy or minority or within a reasonable time after reaching the age of majority. When an infant or minor repudiates or rescinds his agreement to take shares of a company he cannot recover the money paid on them unless there was a total failure of consideration, i.e. the shares turned out to be valueless. [*Stentor v. Sel (Leds) Ltd* (1923) 2 Ch. 452 (A)]. This is because on general principles and the law of equity a minor is not entitled both to repudiate his agreement and to retain specific property which he has acquired under it. Of course in deciding this issue the question to be answered is whether the agreement was favourable at the time the infant entered into it and not at the time when through course of subsequent events it is proved to be not to his benefit.

According to Baron Park in *Peter v. Fleming* (1840) 9 L.J. Ex. 51 the truth is to necessities is

that all such articles as are purely ornamental are not necessities and are to be rejected because they cannot be requisite for any one and for such matter therefore an infant cannot be made responsible, but if they are not strictly of this description then the question arises whether they were bought for the necessary use of the party in order to support himself properly in the degree, state and station of life in which he moved. If they were for such articles the infant may be responsible.

The infant is always liable for his torts, unless the tort is in reality a breach of contract. The law will not, however, permit the minor to benefit by his own fraud, e.g. in one case where the title of his property by a minor was declared void and was set aside, the Court directed the minor to pay compensation when satisfied that the transaction was procured by the minor by a fraudulent misrepresentation as to age (*Jam Nath Singh v. Lala Prasad*, (1908) 31 All. 21). Circumstances such as a minor's fraudulent representation as to his age may be such that the Court may, having regard to Sec. 41 of the Specific Relief Act require the minor to make compensation, e.g. when a minor mortgaged his property fraudulently representing himself to be of full age he was ordered to make compensation to the lender.

### Ratification of a Contract by a Minor

The Act makes no express provision for ratification by a minor on attaining his majority, of a contract entered into by him during minority; but as it is now finally decided by the Judicial Committee: that a minor's agreement is void (*Mohori Bibee v. Dhurmodas Ghose*, (1903) 39 Cal. 539) there can be no ratification by him on attaining majority.

Thus in Indian Law a minor's contract, not falling under any of the exceptions is "void" and not "voidable" so that even the minor cannot enforce it against the other party (*Mohori Bibee v. Dhurmodas Ghose*, (1903) 39 Cal. 539). In English Law, however, certain contracts of infants are "voidable," i.e. the infant can at his option enforce or avoid them but the other party cannot. Even in English Law, by the Infants' Relief Act, three types of contracts when entered into with infants are absolutely void, as we shall see later.

### A Minor Partner

According to the Indian Partnership Act of 1932, Section 30, a minor may not be a partner in a firm except with the consent of all partners for the time being. This minor partner so admitted has a right to such share of the property or profits of the firm as may be agreed upon and he would have access to and inspect and copy any of the accounts of the firm. The liability of the minor partner will, however, be limited to his share in the partnership for acts of the firm. (The minor partner can sue the other partners for account and payment of his share of the property or profits of the firm only when he wants to sever his connection with the firm.) At any time within six months of attaining majority or obtaining knowledge that he had been admitted to the benefits of the partnership, the minor may give public notice either that he elects to become a partner or not to become a partner. If he fails to give such notice after attaining majority or obtaining knowledge after that event, he shall become a partner in the firm on the expiry of the said six months. If he elects to become a partner after attaining majority, his rights and liabilities during the period of minority continue as they were during minority and as to the acts committed by the firm after his attaining the age, he becomes fully liable. This rule is opposed to that of English Law where an infant can on attaining majority repudiate all his liabilities in the firm of which he was a partner during minority, provided he does so within a reasonable time of his attaining his majority. It must, however, be a repudiation of the whole of the liability as well as profits and in case he has received any profits he must return them. The other difference is that if in English Law an infant does not repudiate his partnership on coming of age he is liable only for the debts and losses incurred after his coming of age.

### A Minor Agent

A minor can be appointed an agent and all contracts entered into by the minor, in the course of such an agency, are binding on the principal. The only position created will be that the principal would be unable to recover any loss or damage from a minor agent for negligence or breach of duty (Sec 194)

### Infants' Relief Act

In England there is a special Act known as the Infants' Relief Act of 1874 which declares certain contracts of infants to be illegal. They are -

(1) Agreements entered into by infants after coming of full age to repay money lent in advance to them during their infancy or agreements to pay interest on such loans,

(2) Agreements entered into by such infants after coming of age to pay for goods supplied to them during infancy which are not necessaries and

(3) All accounts stated by infants. An account stated is an admission of a sum of money being due from one person to another, e.g. in ordinary F.O.U.

All these agreements are absolutely void under this Act. It, however, the infant has already paid the money for goods that were not necessaries and has used them he cannot recover the said money.

### Lunatics

A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests (Sec 12). A lunatic differs from an idiot inasmuch as the latter is hopelessly mad, i.e. of unsound mind and has no lucid intervals, whereas a lunatic has lucid intervals during which he is perfectly sane. If therefore a contract is entered into with a lunatic during his lucid interval i.e. when he was perfectly sane, it is binding on him and his estate would be liable, otherwise the contract is bad. In the language of the Act, 'A person who is usually of unsound mind but occasionally of sound mind, may make a contract when he is of sound mind'. Thus a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals [Sec 12, ill (a)]. But as an idiot has no lucid intervals, he cannot enter into binding contracts at all, unless they are for the necessities of life. In England, if a person enters into an agreement with a lunatic without knowing that the other person was a lunatic, or without having any reason to believe him to be such, the contract is good even though entered into with a lunatic. It is not so in India. The contract is void irrespective of the question whether the mental condition of the lunatic



was known to the other side. The value of necessities supplied to idiots and lunatics, however, is recoverable out of their estates.

The above rule is subject to the exception that where after an inquisition under the Lunacy Act 1912 in India, or under a similar inquisition in England, a person is adjudged a lunatic and a committee is appointed, as long as that order is in force an agreement made during a lucid interval will not be enforceable. It has been, however, held in a Madras case that on the analogy of the Privy Council decision, which makes a minor's agreement wholly void if it is not for necessities or for his benefit, that a person of unsound mind was incompetent to contract. [*Muchaima v. Usman Beari*, (1907) 17 Mad. L.J. 78]. The decision, however, may or may not be followed by courts outside the Madras Presidency and seems to be of doubtful validity.

### Drunken or Delirious Person

If a person is so drunk, intoxicated, or delirious from fever as to be incapable of understanding the nature and effect of an agreement or to form a rational judgment as to its effect on his interests, his condition is similar to that of a lunatic and on the same grounds as in the case of a person of unsound mind, the agreement can be avoided by him [Sec. 12, ill. (b)]. But if a drunken person, after recovering from the effects of drink, chooses to abide by his contract, it will be binding on both. In cases where the contract is sought to be avoided on any of the above grounds the party setting up such a disability must prove it.

### Alien

An alien is a person who is not a British subject. Under normal conditions and in times of peace, an alien can enter into any contract with a British subject except to acquire an interest in a British ship; but such a contract would be suspended during the continuance of hostilities or may be entirely dissolved if the intention of the parties cannot substantially be carried out through postponement. In the former case the rights under it are not *annulled* but *revived* and could be enforced upon the conclusion of peace. Contracts to deal in partnership fall under the latter category. Here it is *dissolved* because a continuous performance during the war would entail intercourse with the enemy. An alien enemy cannot enforce contracts during hostilities without a licence from the Government and on the same principle the King's subjects cannot trade with his alien enemies without the King's licence. In the case of a Corporation or a Joint Stock Company, whether it is an enemy company will depend on those who control and direct it and not on the jurisdiction under which it is incorporated nor on the nationality of its shareholders (*Oldham Steamship Co.*, 3 Case, (1917) 2 K.B. 639).

There are some important decisions to illustrate the principle involved in this connection. In one case, where a company had

agreed to give all the products of its mine to alien enemies prior to the outbreak of war with their country, it was held that, whether the contract involved intercourse with the enemy or not, the contract must be declared dissolved, as the resources of the mine would not otherwise be available for the benefit of the country (*Zinc Corporation v. Hirsch*, (1916) 1 K B 541 (C A)). In another contract of a similar nature there was a clause to the effect that, in the case of hostilities, its operation may be suspended. But here too the contract was ordered to be dissolved on similar grounds as in the former case (*Hotel Buck v. Rio Linto*, (1918) A C 260).

The above two cases were decided on the principle that where a contract is likely to result (1) in intercourse with the enemy during the war, or (2) in preventing the resources for the benefit of the country itself and thereby indirectly helps the enemy, the contract must be dissolved.

### Foreign Sovereigns and their Representatives

These are *not* subject to the jurisdiction of our Courts. They can enforce contracts if they choose, but contracts cannot be enforced against them unless they submit voluntarily to the jurisdiction of our Courts. Once they submit to such jurisdiction they are bound by the Courts' order or decree. *Embassadors* with full powers are on the same footing as representatives.

In India, a Foreign State which has been recognized by His Majesty or the Governor General in Council, may sue in any Court with a view to enforce a private right vested in the head of such State or in any officer of such State in his public capacity. For the purposes of these suits persons may be appointed agents of the Sovereign Prince or Ruling Chief by the Government at the request of such Prince for the purpose of acting on behalf of such Prince and prosecuting or defending such suits. A Prince or Chief or any Ambassador or Envoy of a Foreign State may be sued with the consent of the Governor General in Council, certified by the signature of a Secretary to the Government of India. This consent will *only be given* if the said Prince (1) has instituted a suit in the Court against the person desiring to sue him, or (2) by himself or another trades within the local limits of the jurisdiction of the Court, or (3) is in possession of immovable property situate within such limits and is to be sued with reference to such property or for money charged thereon (Secs 84-56, Civil P Code). This consent must be obtained before the institution of the suit, a consent obtained later is not sufficient and the suit may be dismissed or withdrawn with the sanction of the Court with liberty to bring a fresh suit.

### Convicts

Persons undergoing a sentence for treason or felony cannot make valid contracts but with regard to those contracts which they had

entered into previous to conviction, they may appoint *administrators* to act on their behalf. A convict is one on whom a sentence of death or penal servitude has been passed by a competent court of jurisdiction on a charge either of treason or felony [*In re* ], (1909) 1 Ch. 574 on page 577]. The disability will cease as soon as the convict has suffered the punishment or in the case of a sentence of death if the said sentence has been lawfully commuted or where he has served the complete term of his servitude for which a judgment has been passed or any substituted punishment or has been pardoned by the Crown or where the sentence is suspended while he is lawfully at large under any licence.

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### Barristers and Physicians

Barristers cannot sue for fees due to them for services rendered in the ordinary course of their professional duties. Formerly the same law applied to physicians but now a physician can sue for his fees.

It may be added that in the case of physicians, certain Colleges of Physicians prohibit by bye-laws their members from suing for their fees, charges and expenses.

### Married Women

At Common Law, on the principle that husband and wife are one person, a married woman was incapable personally of holding or acquiring property and could not make contracts. The Married Women's Property Act, 1882, introduced the doctrine of "separate property" by which a married woman was entitled to hold and dispose of property and to enter into contracts but there was no personal liability as only her "separate property" was answerable for her debts. Now, after the passing of the 1935 Act, in England, the doctrine of "separate property" is abolished and a married woman is to be treated in all respects as if she were a *feme sole*. Thus she can even be made a bankrupt. A Hindu married woman can enter into contracts and bind her "*Stridhan*". Her contracts would bind her husband only if they are for her necessities. A Mahomedan married woman stands on the same footing in connection with her capacity to enter into contracts. The women of other communities are given the same power of holding separate properties by Section 4 of the Indian Succession Act and Section 4, M. W. Property Act, 1874. The husband is bound to support his wife according to the station in life in which he himself is. If, therefore, a husband refuses to support his wife, whether European, Hindu, Mahomedan or Parsi, she can enter into contracts for the supply of necessities and make her husband pay for same. On the other hand, if the wife leaves her husband's protection of her own accord or has been given a special allowance she loses the right to pledge his credit.

### Corporation

A corporation is defined as an artificial person, created by law, with a perpetual succession and a common seal. As it is not a natural person it enters into contracts through an agent, who might be either a manager, a secretary, a chairman or a director of the corporation.

In all contracts entered into by corporations, specially trading corporations, which are in the daily and usual course of the business of the corporations and of frequent occurrence, the common seal of the corporation may be dispensed with and instead, the duly authorised agent of the company may sign on its behalf. The contractual capacity itself in the case of corporations depends in each case, on the mode of their creation and the purpose for which they are created. The memorandum and the articles of association of every corporation would be the guiding instruments in that regard.

But in the case of unusual contracts and contracts of importance, the seal of the company must be affixed.

The agent who signs on behalf of the corporation must make it clear that he is signing only as an agent of the company, e.g.

For the Bank of Bombay, J. Peghie, 'Secretary,' would be the correct signature as it clearly indicates that Mr Peghie signs as an agent of the Bank.

If, on the other hand, he were to sign as—

J. Peghie,

Secretary, Bank of Bombay

he would be taken to have signed for himself and not on behalf of the Bank.

## II. AGREEMENTS CONTRARY TO POSITIVE LAW, MORALITY OR PUBLIC POLICY

### Opposed to positive Law

An agreement is contrary to positive law or is forbidden by law when its object is to commit a crime or to defraud anybody. The law has from time to time provided that certain acts shall not be committed and has in some cases laid down that the commission of such acts would be punished. If, therefore, a contract is of such a nature as would violate or defy such a law it is void. The Indian Contract Act lays down that where the object of an agreement is either (1) forbidden by law, or (2) is of such a nature that, if permitted, it would defeat the provisions of any law, or (3) involves injury to the person or property of another, it is void (Sec. 23).

### Opposed to morals or good manners

An agreement which the Court regards as immoral is void (Sec. 23), e.g. where an agreement is made to let a house for an immoral purpose, or an agreement to print an indecent picture or

book, it is bad and the landlord in the former and the printer in the latter case cannot sue on it (Sec. 23).

### Opposed to public policy

An agreement is contrary to public policy when it is of such a nature that it tends to prejudice the general welfare of the State or the interest of the public, such as agreements which prejudice the State's interests in time of war (trading with enemies) or stifling prosecutions. In private life agreements which attempt to impose inconvenient and unreasonable restrictions on the rights of individuals to freely exercise any lawful trade or calling are opposed to public policy with certain reservations. These are called "agreements in restraint of trade".

### Agreements in Restraint of Trade

If an agreement is entered into, which places a certain restraint or check on the liberty of a person to carry on a lawful trade or profession, such an agreement may be good or void according as to whether the restraint imposed is reasonable or not. Whether the restraint is reasonable or otherwise, is a question of fact which would have to be decided according to the circumstances of each individual case. Persons buying up a business and paying money for goodwill, generally require the seller to give them an agreement to the effect that he will not trade within certain limits. In spite of this restraint such an agreement may be good if the restriction is reasonable. Reasonable means such as would afford the party a fair protection as far as his interests are concerned. In English Law, according to the latest decisions, no limit as to time or space is necessary in order to bring a contract within the definition of reasonableness, but in India the Exception No. 1 to Section 27 clearly lays down the words "within specified local limits" which seems reasonable to the Court looking to the nature of the business. Thus a wide restraint which is unlimited as to space would certainly be considered unreasonable in India. Again, the same section lays down two other exceptions which specifically provide that partners may, by agreement between themselves, prior to dissolution, provide that some, or all of them, will not carry on any business similar to the partnership within certain local limits, or during the continuance of partnership agree not to carry on any business other than that of the partnership. A contract, however, to sell all salt produced to B and not to anyone else at a certain price is not a restraint which is objectionable. In the case of agreements of service if an employee agrees that he will not compete with his employer during the term of service, it is not a restraint of trade.

To summarise, contracts in restraint of trade are not contrary to public policy and are valid in case (1) they are not unreasonable looking from the standpoint of the person on whom the restraint is

levied, or (2) they are reasonably necessary to protect the interest of the party in whose favour the restraint is imposed, or (3) they are generally speaking not injurious to the public.

It may be added that under the old Common Law, dating from the age of Queen Elizabeth, all restraints of trade were considered to be undesirable and bad, but in course of time it was realized that in the business world particularly, certain restraints were not contrary to public policy but were desirable in the interest of trade itself; for example, when a person wishes to sell the goodwill of his business, unless the seller can be restrained from carrying on a competing business in the same line the amount paid by way of goodwill will be lost and the seller under such a circumstance will not be able to secure any goodwill value at all. Thus the rules against restraints were gradually relaxed. If on reading a contract it appears that the restraint is unreasonable and would be against the interest of either party, that will constitute an objectionable restraint. Of course the court of law will decide this question by taking all the circumstances such as the nature of the business or trade or occupation, the area covered by the restraint and the period of time for which the restraint has to operate, into consideration. The result of the illegality of such contracts is that the contract will be void and unenforceable and any security that may have been given or any consideration money paid will also be void. Generally speaking, the rule is that money so paid or goods delivered in connection with an illegal agreement are not recoverable, but to that rule there are well known exceptions. The rule is that where the parties are not in *pari delicto*, the party who is innocent is entitled to recover the goods provided money was handed over or transferred. The parties are considered not to be in *pari delicto* where the party who is given money, property or goods was made to do so under fraud, oppression or duress of the other party or was an entirely ignorant man whose ignorance was taken advantage of by a clever person or where a statute has been passed prohibiting a contract with a view to protect any person or class of persons or for protecting one set of persons from another owing to the peculiar situation and condition of one class being liable to be oppressed or imposed upon by the other and under such a contract a person who is protected by the statute has parted with his money or property.

The money or property has also to be returned in case no part of the illegal purpose has been carried out and the party repudiates the contract. This cannot be done however, in case any part of the illegal purpose has been carried out. To take an example, in England under the Licensed Money Lender Act, a licensed money-lender is entitled to carry on business at a place where he is authorised and if he gives a loan at a place where he is not authorised or in a name other than the authorised name under which he is licensed, he cannot recover his principal or interest, though the borrower has

whose protection this Act has been passed can recover from the money-lender the securities he has deposited against the loan. In the case of marriage brokerage contracts also, the money paid for introducing the couples can be recovered even after the introduction has taken place.

With reference to illegality, it must be noted that even though a contract may not be illegal by itself, but if the person who makes such a contract knows that the subject matter of the contract has to be applied by the opposite party to an illegal or immoral purpose, he cannot recover on the contract because illegality vitiates all collateral transactions. Thus where a landlord lets a flat knowing very well that the same will be used for an immoral purpose such as a gambling den, he cannot recover the rent. Where a contract was legal at the time it was entered into but became illegal subsequently through the passing of an Act, it is dissolved and the parties concerned are excused from performance thereof.

On the same ground of public policy a marriage brokerage contract, or an agreement to pay money to the parent or guardian of a minor in consideration of such parent or guardian consenting to the said marriage, is void. Agreements for the sale of public offices, tending to create interest against duty, or agreements injurious to the public service, for trading with the enemy, for stifling prosecution of a non-compoundable offence which pervert the course of justice, etc. are bad on the same ground.

Certain offences such as assault, etc. are known as compoundable offences, i.e. in or outside a court of law the parties can come to a settlement. There are other offences of a very serious nature which the law has declared to be non-compoundable and in that case any compromise made with a view not to prosecute would be bad and a criminal offence in itself. In mercantile transactions, frequently, a person commits a breach of trust or similar offence. In such a case the employer with whom the breach of trust has been committed has a right to recover money so misappropriated through a civil action. This civil case he may compromise if he so desires but he should not give in undertaking that this compromise would mean that the party who had committed this serious offence will not be prosecuted.

Agreements in restraint of legal proceedings are void. Section 28 says that if a party is restricted absolutely from enforcing his rights under, or in respect of, any contract by the usual legal proceedings in the ordinary tribunals, such an agreement is void to that extent. The section, however, exempts from its operation contracts to refer to arbitration. This is because a simple contract to refer to arbitration does not oust the jurisdiction of the court, the arbitrator's award is liable to be set aside, modified or otherwise dealt with by the court on an appeal. If an agreement stated that all the disputes between the parties shall be referred to arbitration and that the decision of the arbitrators shall be final, the first part of the agree-

ment would hold good and can be enforced, whereas the second part would be void.

### ChamPERTY and Maintenance

This is promotion of litigation in which the person promoting has no interest, with or without a bargain with the party assisted by labour or money, to divide the proceeds or gains of such litigation with the person so promoting or assisting. The English Law forbids such practices and makes the person so wrongfully assisting or maintaining the litigation liable to an action for damages at the suit of the person injured. These rules of English law have not been adopted in India but it has been held by the Privy Council in *Bhagwat Dayal Singh v. Debi Dayal Sahu*, (1909) 35 Cal 420 that an agreement champertous in English law was not necessarily void in India; it must be proved to be against public policy to render it void. Thus if a contract falling under this heading is proved to be "against good policy and justice or tending to promote unnecessary litigation" or "in a legal sense is immoral" the same would be void in India. [*Fischer v. Kamlu Naicker* (1860) 8 MIA 170]

### Agreements with uncertain meaning

Agreements, the meaning of which is not certain, or capable of being made certain are void (Sec 29). Thus if A entered into an agreement to sell B 100 tons of oil the agreement would be void for uncertainty, but if A dealt exclusively in, say, coconut oil it would not be uncertain, because this fact would sufficiently indicate what kind of oil was meant. If, on the other hand, he dealt in different kinds of oil it would be otherwise.

### VOID AGREEMENTS

The following agreements are void according to the provisions of the various sections of the Contract Act —

- (1) Agreements, the object or consideration of which is unlawful (Sec 23)
- (2) Agreements in Restraint of Marriage of any person other than a minor (Sec 26)
- (3) Agreements in Restraint of Trade except those covered by Exceptions 1, 2 and 3 (Sec 27)
- (4) Agreements in Restraint of Judicial Proceedings except contracts to refer to arbitration (Sec 28)
- (5) Uncertain agreements (Sec 29)
- (6) Wagering agreements (Sec 30)
- (7) Impossible agreements (Sec 56)

(1) We have already dealt with agreements the object or consideration of which is unlawful, viz those forbidden by law or those of such a nature that, if permitted, they would defeat the



provisions of any law, fraudulent agreements, those involving or implying injury to the person or property of another, immoral agreements, and those opposed to public policy.

### Restraint against Marriage

(2) "Agreements in restraint of marriage of any person other than a minor are void" (Sec 26). Thus an agreement by a person not to marry at all is void. In India it would also be void even though the agreement refers only to one particular person, or a particular class of persons, whom the party agreeing undertakes not to marry. In England restraint against marrying a particular person is, however, valid.

(3) & (4) We have already dealt with agreements in Restraint of Trade and of Judicial Proceedings.

(5) "Agreements, the meaning of which is not certain or capable of being made certain are void" (Sec 29), e.g. A agrees to sell to B a "hundred tons of oil". There is nothing whatever to show what kind of oil was intended and therefore the agreement is void for uncertainty. If, on the other hand, the special description of the oil is expressly stated, or where B dealt exclusively in coconut oil, the agreement would not be uncertain and would therefore be good.

### Wagering agreements

(6) A wager is defined by Anson as 'a promise to give money or money's worth upon the determination or ascertainment of an uncertain event'. Section 30 lays down that '*agreements by way of wager are void*' and no suit shall be brought for recovering any thing alleged to be won on any wager, or to recover anything entrusted to any person to abide the result of any wager. With regard to wagering contracts it may be noted that two parties may enter into a formal contract for sale and purchase of goods at a given price and for their delivery at a given time. If, however, the circumstances are such as warrant the legal inference that both the contracting parties never intended the actual transfer of goods, but that their dominant idea was to give or receive the difference between the market price and the contract price at the time of delivery, such a contract is not based on a genuine mercantile transaction, but on a mere wager or bet on the rise or fall of the market. In short, in the case of wagering contracts neither party thinks of or intends to perform the contract itself, but the dominant idea is to receive or pay differences on the happening or failure of an event, the final issue of which is uncertain. The agreement will also be a wagering agreement in cases where though the dominant intention of the parties was to pay or receive the market difference, there was a stipulation which gave one of the parties an option to demand delivery on the payment of an extra sum. It will thus be seen that an agreement which to all appearances is a simple mercantile transac-

tion in the form of an agreement to sell may be pure and simple wager. The Courts of Law will take all the circumstances of the case in view before arriving at a decision on this point. In the words of Davar, J., "What the Court has to do is not simply to look at the transactions as they appear on the face of them, but to go beyond them, and ascertain the true nature of the dealings between the parties by probing into surrounding circumstances and minutely examining the position of the parties and the general character of the business carried on by them (*Ilumukhras Imoluckchand v. Navotamdas Girdhandas*, 9 Bom L. R. 125). In a later case the Privy Council extended this principle considerably by holding that "the mere fact that a contract for sale and purchase of goods is of a highly speculative character, cannot alone vitiate the transaction as a wagering contract within the meaning of Sec 30 of the Indian Contract Act, 1872. To produce that result there must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded, but that differences only should become payable. They went further and stated that "when no such definite agreement or undertaking was proved and it appeared that delivery of the goods might always have been insisted on, the contract was not bad on the ground of wagering (*Sukhdass Ramprasad v. Govinddoss Chaturbhujadoss & Co*, 30 Bom L R 238).

It may be added here that lotteries are games of chance where the prize is dependent on the drawing or casting of lots. The Penal Code (Section 294A) makes it an offence to keep any office or place for the purpose of drawing any lottery without the authority of Government.

### Teji Mandi transactions

The transactions under this denomination are divided into three classes, viz (1) *Teji* pure and simple, (2) *Mandi* pure and simple, and (3) *Teji Mandi* or both the transactions combined.

We shall now proceed to explain each class separately with the help of an illustration.

In the case of *Teji* pure and simple, what the dealer A does is to secure an option to buy a certain quantity of goods, say 100 bales of cotton, at Rs 500 per bale. In consideration of this option being given to him by merchant B who deals in *Teji*, he pays him a premium of say Rs 10 on each bale. The option here is to purchase and take delivery of these bales at some future date, as fixed by both these parties at the time of the contract, if it suits A, or failing that A is free to abandon the option. The option premium paid is of course non-returnable in either case. Supposing that on the delivery date the market were to rise to say Rs. 550 per bale, A would exercise his option to purchase at Rs. 500 and make a profit of Rs. 50 per bale, less his option premium of Rs. 10 per bale, i.e. a net profit of Rs 40 per bale. If, on the other hand, the market

were to fall say to Rs. 480 on the delivery date, A would abandon his option. It will be thus seen that as under any circumstance the option money paid is not refundable, the transaction would not result in a profit unless the market rises above the margin of Rs. 10 per bale which is the option premium in this illustration.

In these transactions, B the seller of the option is known as *khannai*, i.e. 'the Eater' of the option and A the buyer is called *lagudnai*, i.e. the applicer of the option.

On the same principle, in the case of *Mandi*, if A thinks that the market is going to fall, he secures an option from B to sell a certain number of bales, say at Rs. 500 to B, to be delivered at some future date fixed by the parties. Here supposing that Rs. 10 per bale was the option premium and the market falls to say Rs. 460, A would purchase these bales at Rs. 460 and sell them to B at Rs. 500 in terms of his option. Here A would make a profit of Rs. 40 less the option of Rs. 10, i.e. net Rs. 30 per bale.

In the above transactions the option was single, i.e. A purchased in the first case the option only to "buy", whereas in the second case he secured the option only to "sell". There are other transactions where 'double options' are dealt in, known as *Teji Mandi* transactions.

Here what actually happens is that one party buys what is known as a **double option** and pays a certain premium over the contract price of the commodity. This gives him the right to buy or sell a certain quantity at the price fixed by this agreement on the settling day either of the market concerned or as fixed by the agreement. Thus if A buys 1 *teji mandi* of 51y, silver at 10 annas per tola and for that purpose pays one anna for the *teji* and another anna for the *mandi* what he would do would be that if on the settling day the price rises over 10 annas, say it is 13 annas, he may buy the agreed quantity making a net profit of one anna per tola, after deducting 2 annas paid by way of premium on each transaction. If, on the other hand, the market falls to, say, 7 annas, he would sell the quantity at 10 annas and recover three annas per tola of which one anna would be his net profit after deducting two annas per tola paid for the option premium. The question whether these types of transactions are wagering transactions has been repeatedly discussed in our High Courts. The old view was that such agreements were wagering agreements altogether and therefore void (*Ramchandia v. Ganabison*, (1910) 12 Bom. L. R. 590), but in later decisions it has been held that *teji mandi* transactions must be regarded as wagering transactions and the onus of proving that they are not such would lie on the party so alleging. In a later case this was further improved upon to the effect that *teji mandi* cannot be held as wagers on account of their apparent nature and characteristics alone but the common intention of parties ought to be proved (*Jesiram Juggonath v. Tulhadas*, 37 Bom. L. R. 264; *Mandak v.*

*Allibhai*, 24 Bom L. R. 812) In another case where *teji* alone was bought it was decided that a pure *teji* transaction is on exactly the same footing as *voida* transactions and unless it can be positively proved that the parties agreed neither to ask for nor to give delivery, the transactions are not wagering transactions (*Manubhai v. Keshavn*, 24 Bom L. R. 60)

### Agreements collateral to Wagering Contracts

The Contract Act makes a wagering contract void but the fact that the transaction is ~~an~~ wager does not taint collateral transactions, therefore, the said collateral transactions can be enforced, e.g. (1) A loan to help the payment of a gambling debt, (2) Brokerage on a wagering contract; (3) Deposit on same, etc. Under the Bombay Act III of 1865, however, no money knowingly paid by an agent at the request of his principal on account of wagering transactions, nor the commission payable by way of fees, reward, etc., would be recoverable by action in the Presidency of Bombay whether the plaintiff be or not be a party to such a transaction. This Act applies only to the Presidency of Bombay and therefore in other Presidencies transactions collateral to a wagering agreement are good.

(?) Impossible agreements are dealt with later.

## III. AGREEMENTS IN PROPER FORM OR SUPPORTED BY CONSIDERATION

### Form in which Contracts can be made

The law has divided contracts into three main classes as to the form in which they are to be entered into, viz. (1) **Contracts of Record**, (2) **Simple contracts**, and (3) **Specialty contracts**. (1) **Contracts of record** are obligations which arise through entries in parchment rolls or records of a court of law. The most familiar type of this contract is a judgment of a court of record. This judgment depends as far as its binding force is concerned on the authority of the judge as distinguished from agreement between the parties. Frequently recognizances are also given by parties to judges and courts as representing the Crown. These recognizances promise to do some particular act or to submit to a fine or penalty such as an undertaking in a criminal charge to come for judgment if called upon or to pay a specific sum. These are also contracts of record. The record conclusively proves itself and admits of no dispute. (2) **Simple contracts** may be either oral or in writing. They must be supported by consideration. (3) **Specialty contracts** in England are contracts which are required to be either written or printed, sealed and delivered, and if executed after January 1, 1926, signed by the promisor if the promisor is an individual. They are known as "**deeds**" and do not

require to be supported by valuable consideration. A deed written and sealed but not delivered is called an "escrow". In India, Section 25 of the Contract Act provides that an agreement unsupported by consideration is void, unless it is in writing and registered under the law for registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other.

### Indenture and Deed Poll

We have seen what a contract by deed happens to be in English Law. It may, however, be added that the term deed is applied also to an instrument by which property is conveyed by one person to another. The most common form of such deeds is to be found in connection with leases of houses and lands or premises for business purposes. These deeds contain what are called *Covenants* which are promises by one party of the deed to the other. In the same manner there is a mortgage deed between the mortgagor of property and the mortgagee. There may be a deed promising to pay the money for which no consideration has been given and in the case of such deeds where covenants are by one side only the party who makes these promises is the only party who signs, seals and delivers same. In the case of deeds, however, such as mortgage deeds or leases both the parties give promises to each other and thus all parties granting such covenants must sign, seal and deliver.

In olden days the words indenture and deed poll had a peculiar significance. An indenture was made where there were more than one party. Here a number of copies had to be prepared to be kept by each of the parties to such a deed and in further preparation of the same, these deeds were cut or indented on the margin to correspond with each other and thus they came to be called indentures. Now days although this practice of indenting has disappeared, such deeds are still known as indentures. Where, however, there was only one party making the covenants, naturally only one deed was prepared and thus there was no necessity of indenting it. Such a deed was called a deed poll.

### Contracts implied by law

There are cases where circumstances may arise under which the law may imply a certain contractual obligation. Thus, where a person happens to have received a sum of money which justly belongs to somebody else and wrongfully refuses to repay it to the person to whom it justly belongs, the latter, i.e. the person to whom it belongs is permitted by law to sue the former who unjustly withholds it on a fictitious presumption to the effect that the person who unjustly withholds had promised to pay even though in fact that party was refusing to pay. These types of contracts are frequently called by some authors, *quasi-contracts*. In these cases the promise to pay

is looked upon as an implication of law and not a question of fact. In other words, the law implies the contract from the circumstances. The most common forms of such contracts implied by law are (1) for an action upon account stated, or (2) one for money paid by one person to the use of another, or (3) for money due upon a judgment in a foreign court or for money received by one person for the use of another person.

The case of an action upon an account stated arises where the party who owes the money admits in some form or other that the said sum is due. The usual form in which an account is stated is by passing an I. O. U. Of course in the case of such account stated action, the defendant is quite at liberty to prove that there was some mistake in his admission or that the debt was void for want of consideration or that the same was illegal.

The action for money paid for the use of another may arise where X requests Y to pay a certain debt owed by X on X's behalf which is done by Y. On such payment by Y of the said debt there is an implication in law of a promise by X to repay his money to Y, irrespective of the fact that there was no express promise by X to refund the money.

The case of an action for money had and received for the use of another may arise where X has paid money to Y either under a mistake of fact or on a consideration which has failed entirely or under duress or extortion or fraud. The mistake of course must be of fact and not of law and the extortion or compulsion must be illegal and not one under legitimate process of law. The failure of consideration has also to be complete and not partial.

### Contracts of Record

We have already dealt with contracts of record above. They consist either of judgments delivered and entered on the records of competent courts of law, or recognizances. The judgment must be of British courts whereas one of a foreign court creates only a simple contract debt. The other condition is that in order to fall under the contracts of record they should have been delivered by courts of record as distinguished from Imperial courts which are not considered to be courts of record. The judgment of a court of record is undoubtedly binding and final as to its contents but in the case of one by a foreign court, it may also be impeached on a ground other than that it is not final or that the same was given without jurisdiction or that sufficient notice was not given to the party against whom the judgment was obtained. For this purpose all the judgments of colonial courts and the courts of Ireland and Scotland are treated as foreign judgments by English Courts. In the case of a foreign judgment, however, it may be enforced by bringing an action in British and Indian Courts based on the judgment and obtaining a decree

on that footing, provided the foreign courts show the same courtesy in the case of judgments of British or Indian Courts

### Recognizances

Recognizances are generally taken in criminal cases when a person is bound over and a promise is entered on the rolls of the court to pay a sum of money if he disobeys certain orders, or it may be an agreement with the Crown to be 'bound over' to be of good behaviour or failing that to come up for judgment when called upon. A recognizance is a contract made by a person with the Crown in its judicial capacity.

### Consideration

Consideration is 'which for what'—Something that a person gives for something he receives. In the case of simple agreements the law lays down that they must be supported by consideration, i.e. both the parties must give and receive something. Consideration, defined by the Indian Contract Act as—When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise [Sec 2(d)]. If there is no consideration on either side, the agreement is void unless it is in writing and registered in India and is made on account of natural love and affection as per Section 25 of the Contract Act.

Consideration was defined in *Currie v Misa*, (1875) 1 R 10, Ex p 162, 18—

"Some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other"

All simple contracts must be supported by valuable consideration. The consideration may be either "good", said to be so called because it is good for nothing, and which consists of natural love and affection [Sec 25(1)] or "valuable", i.e. one which can be estimated in money. It may be also noted that as long as the consideration is of some value it is not necessary that it should be adequate. That is a matter for the parties themselves to settle when entering into a contract. The Court will never interfere on the ground of the inadequacy of consideration, unless fraud is proved, or the contract is in restraint of trade (Sec 25, Ex 2). It is also necessary that the consideration must be of ascertainable value and must not be physically or legally impossible. The consideration must be legal, must not be of an immoral nature, or contrary to public policy the maxim being *ex turpi causa non oritur actio*.

The consideration may be (1) Executed, (2) Executory, or (3) Past.

In English Law an executed or executory consideration would be

sufficient to support a simple contract, but a past consideration would not, whereas, according to Indian Law, a past act is also sufficient to support a simple agreement. In English Law, however, there are two exceptions to the general rule as to past consideration, viz. (1) When the past consideration is given at the request of the person who makes the promise, or (2) When a party, say, under some Act such as the Statute of Limitation, is not bound to pay a debt because six years have expired, gives a promise to pay it in writing, the agreement is binding though based on a past consideration. Again, in England the rule is that the consideration must move from the promisee, and, therefore, strangers to consideration cannot bring an action on the contract and enforce it. This is not so in India, where the consideration may move either from the promisee or any other person.

Section 25 of our Act, as we have seen, says that an agreement made without consideration is void, unless it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in near relation to each other or unless it is a promise to compensate wholly or in part a person, who has already voluntarily done something for the promisor, or is a promise in writing to pay a debt barred by the Limitation Act.

Again, it must be remembered that if a man does that which he is legally bound to do that is no consideration, e.g. as per English law where a man pays a smaller sum in satisfaction of a larger, such payment will not be a good discharge of the debt because he is doing nothing more than he is legally bound to do, e.g. if A owes £50 to B and pays £45 in cash, taking a receipt in full, there is nothing to prevent B from suing for the balance in spite of the receipt. There must be something new to support this promise of B not to sue for the balance of £5. In one case, however, where a cheque was given by A to B, say for £45, and B gave a receipt for the full amount of £50, it was held that the cheque being a negotiable instrument, a new right of action on that instrument was given, which may be taken as a consideration for the promise of B to A for the balance of £5. In India, however, Section 63 of the Contract Act gives a clear power to dispense with or remit wholly or in part a debt due from the debtor. The exact language of the Section runs as follows—"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit." The illustration (b) to this Section gives a clear example, viz. "A owes B Rs. 5,000. A pays to B, and B accepts, in satisfaction of the whole debt, Rs. 2,000 paid at the time and place at which Rs. 5,000 were payable. The whole debt is discharged." In English law this would be known as a "waiver" which is a mere agreement to forego contractual rights,



and cannot be valid where the contract is executed, unless made under seal or for consideration

A compromise of a disputed claim made *bona fide* is a valuable consideration for a promise, although the claim was an unfounded one, as long as the plaintiff honestly believed he had a good claim (*Callisher v Bischoffsheim*, (1870) L R 5, Q B 449)

### CONSENT

The essence of every agreement is that there ought to be free consent on both sides. Here both the parties must agree upon the same thing, in the same sense (Sec 13), e.g. if two persons enter into a contract concerning a particular person or thing and it turns out that, misguided by a similarity of name, they had a different person or ship in mind no contract would exist between them [*Raffles v Wichelhaus*, (1864) 2 H & C 906]. Section 14 of the Contract Act lays down rules which state that there cannot be free consent where there has been—

- (1) coercion according to Section 15
- (2) undue influence according to Section 16
- (3) misrepresentation according to Section 19
- (4) fraud according to Section 17, or
- (5) mistake of certain types, as laid down in Sections 20, 21 and 22

### Coercion and undue influence

“Coercion” is defined by Section 15 of the Act as committing, or threatening to commit, any of the acts forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. In English law this would be known as ‘Duress’. It is defined by English Judges as either actual or threatened violence or illegal imprisonment against the party to the contract or any of his own relatives in whom he may be most interested such as wife, parent or child. This violence, of course, must have been threatened or exercised by the other party to the contract.

“Undue influence” is defined by Section 16 of the Act as an influence exercised by one party on the other where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This is a general rule and the section states further that where a person holds the position of a real or apparent authority over the other, or where ~~one~~ stands in a fiduciary position to the other, where the contract is entered into with a person whose mental capacity is temporarily affected by reason of age, illness or mental or bodily distress, such a person is supposed to be in a position to dominate the will of the other. Our

Act in the case of undue influence goes so far as to say that, where to the court the contract seems unconscionable and the court finds that one of the parties is in a position to dominate the will of the other, the law throws the whole burden of proving that such a contract was not induced by undue influence on the person in the dominating position above referred to. Both in case of coercion and undue influence the contract is voidable at the option of the party whose consent was so secured (Secs 19 and 19A), but if the undue influence is withdrawn, the contract must be avoided within a reasonable time.

Undue influence is thus, virtually speaking, moral pressure and will be presumed where there is some relationship between the parties concerned either parental or confidential. Let us take a few instances on the point of undue influence. A the father, who has advanced money to his son B during minority, when the son comes of age, making an unfair use of his parental authority and influence, takes a bond from the son for a much larger amount. In this case A has used undue influence; on the same principle, if a physician who has been treating a patient who has become enfeebled by illness, disease, or age, takes a bond, or enters into an advantageous contract either with regard to his own remuneration, or some other particular, he will have used undue influence. Similar relationships of confidence and authority would be taken to exist between a guardian and a ward, a solicitor and a client, and a trustee and a *cum que* trust, but no presumption arises between husband and wife, doctor and patient, or clergyman and communicant.

In short, it should be noted that if a person wishes to plead undue influence in defence of an action brought against him on a contract, it is necessary for him to show, first, that previous to entering upon the contract the other party held a position, or relationship of a nature that would enable him to dominate the will of the other, and secondly, unless the transaction appears unconscionable on the face of it to the court he must lead evidence to that effect and satisfy the court on that head. As soon as he does that, the burden shifts on the other party who is in a position to dominate the will, to prove that he did not use that undue influence to induce the other party to enter into the contract.

In the case of duress and coercion, consent is destroyed, whereas in the case of undue influence, consent is induced by improper means.

### Unconscionable transactions

These are transactions which though not brought about by fraud are forced upon one party by the other by the unconscionable exercise of the power that the party has on the other, e.g. where a creditor who has a debtor under his grip, through the latter being heavily indebted to him, forces him to give an agreement of an extortionate nature on a fresh loan being advanced.

**Purdah-nishin women**

The rule of law as to this class of women is that in the case of contracts entered into by them with their husbands, or other persons having some control or influence over them, the burden is on the other side to prove that the documents, to which they assented, were properly read out and explained to them, and that they were clearly understood. For this purpose, however, a lady claiming to be *purdah nishin* must prove complete seclusion, irrespective of her being a Hindu or a Mahomedan. If a lady, even though she goes about with her face concealed, or sits behind the *purdah*, transacts her own business, arranges for rents from her own tenants and communicates on business affairs with other male outsiders who are not members of her family, she will not come within the legal definition of *purdah nishin*.

**MISREPRESENTATION AND FRAUD**

*Misrepresentation* is, to state it briefly, any untrue statement made by a party to the contract to another, which is a material statement of fact and not of law and which induced the other party to act upon the statement and enter into the contract. In India a positive assurance as to law would also fall under that heading. Misrepresentation may be either (1) innocent, or (2) fraudulent. It is innocent when the party who made that statement honestly believed at that time that it was true, but it turns out afterwards to be false. The remedy for innocent misrepresentation, where no intention to deceive exists, is rescission of the contract and restitution. It must, however, be noted that the party misrepresented must apply for his remedy in good time. Such an innocent misrepresentation does not give any right to damages. In this case the fact that the party misrepresented had the means of discovering the truth would be a good defence but in the case of fraud no such defence would lie with the defrauding party.

Fraudulent misrepresentation is a false statement of fact made wilfully, or knowingly or without belief in its truth, or recklessly, not caring whether it be true or false, with the intention to deceive and to be acted upon by the opposite party, and actually inducing him to so act upon it to his detriment. A mere expression of opinion or "puffing", i.e. the ordinary exaggeration of business talking, will not be fraud, as for example if a seller says, "I think this bicycle is worth Rs. 200", that will not amount to fraud, even though the statement was knowingly false, but if he says, "I myself paid Rs. 200 for it" and if that statement is false, it will amount to fraud. A mere omission, even though such as would give due reason for the setting aside of the contract, is not fraud. [*Arkwright v. Newbold*, (1881) 17 Ch.D. 320.] The injured party would have the right both of availing the contract, i.e. rescission, and of suing for damages.

Both misrepresentation and fraud make a contract voidable at the option of the party wronged by the misrepresentation. In the case of fraud, however, the party defrauded gets the additional remedy of suing for damages brought about by such fraud. In the case of innocent misrepresentation the only remedies are rescission and restitution.

It will be thus seen that in order to succeed, the party suing on the ground of misrepresentation should prove :—

- (1) that the mis statement was that of fact and not of law, and
- (2) that the party who is suing relied upon the said mis-statement and was induced to enter into the contract believing it to be true, and
- (3) that the said statement was material to the contract, and
- (4) that the said mis statement was made either by the parties sought to be charged or by their duly authorized agent.

The mis statement may have been innocently made, i.e. the party making it may have honestly believed it to be true in which case the remedy of the injured party, as we have seen above, will be rescission of the contract and restitution to the original position, i.e. the position in which he stood at the time he entered into the contract.

In cases of fraud besides proving the above four requirements, it should be further proved that the mis statement was made deliberately or wilfully by the party with the intention to deceive and that the opposite party was so deceived.

### EFFECT OF MISTAKES

It often happens that one of the parties to a contract pleads mistake as a ground for setting it aside, because according to him there was not that genuine consent to the agreement which is the essence of every contract. With regard to this it is to be borne in mind that mistakes of every description could not be permitted to be used in such a manner without making it impossible for contracts to be entered into at all. Mistakes as to *judgment*, or mistakes as to *expectation*, would not be any ground at all for setting aside the contract. A man, therefore, cannot set aside the contract on the plea that he expected the market to rise, but has now found out that he was mistaken in his expectation, because the market had actually fallen. In one case where a man bought a stove thinking it was large enough to keep his room warm, but afterwards found out that it was too small for his purpose and wanted to return the stove and get out of the contract on the ground of mistake, he was not allowed to do so because this was only a mistake as to judgment. Again, a mistake as to any law in British India would not be a ground for setting aside a contract; but a mistake as to a law not in force in British India has the same effect as a mistake of fact (Sec. 31).

There are, of course, mistakes of such a nature that persons labouring under them are taken not to have used that judgment, which every one is supposed to use while entering into a contract and therefore there is an absence of that genuine consent which is the essence of every agreement, i.e. no *consensus ad idem*. The cases in which mistakes can be pleaded to set aside a contract may arise in any of the following ways :—

#### Mistake as to matter of fact

1. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement. (An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.) (Sec. 20). Under this rule would fall a mistake as to the existence of a thing, e.g. A contracted to sell to B a cargo of corn supposed to be on its way to England, whereas unknown to both, the cargo had already been sold at an intermediate port before the day of the contract. Here the agreement would be void. [*Counter v. Hastie*, (1856) 5 H.L.C. 673.]

#### Mistake in expression of contract or intention of parties

2. Where the parties in a written contract have made a common mistake the result of which is that the said contract does not in fact express the intention of the parties concerned, it is naturally not the agreement of the parties. A very strong case of course has to be made as otherwise the value of writing agreements would be considerably destroyed. The usual result is that such a contract, if the court is satisfied that it does not express the intention of the parties concerned, is declared to be unenforceable. There are cases, however, where the court under its equitable jurisdiction interferes and rectifies the contract; where the position has been created through a mere clerical error apparent on the face of the document itself. There are, however, rare cases where Equity courts when they are satisfied that the written document does not express the intention of parties have interfered but here the position is that the court does not make a new agreement but all that it does is to rectify the error in the written agreement in order to bring the written agreement on the same footing as the oral agreement which was originally made and on the footing of which the writing was prepared.

#### Mistake as to identity of persons

3. Where there is a mistake as to the identity of the person with whom one is contracting. This mistake is material only where the personality of the other party is of importance to the person making the error, and may arise out of either the negligence or the fraud of the other party. In one case A was in the habit of trading under a firm name of Boulton & Co., and B

was in the habit of entering into contracts with A, by sending orders and addressing letters to Boulton & Co. Then A sold his business to C unknown to B, and C continued to trade in the old name of the firm, viz. Boulton & Co., and B in the usual course of his business sent orders to Boulton & Co., in reply to which goods were sent by C who opened these letters. It was held, when B refused to take up the goods, on knowing of the facts of the change of ownership, that the offer for goods was really sent to A, the previous owner, and not to C, the present owner of Boulton & Co., and therefore C could not accept an offer which was never sent to him. As far as B was concerned there was a genuine mistake as to the identity of the party with whom he was dealing. This mistake would not have arisen had it not been for the negligence of C in not communicating to B the change of the ownership of the firm (*Boulton v Jones*, 2 H and N 564). In another case where a notorious usurer assumed a false name and began to trade, inducing other parties to deal with him, who would not have done so if they had known of his identity, the Court held that here the contract may be repudiated on the ground of mistake as to identity [*Gordon v Street*, (1899) 2 Q B (A 641)]. This type of mistake as well as mistake as to the identity and quality of the subject-matter as dealt with in the next para are known as "fundamental errors" and fall under Section 13.

#### Mistake as to identity and quality of the subject-matter

4 Where both the parties are mistaken as to the identity of the property which is the subject-matter of the contract. In one case A agreed to buy of B 125 bales of Brouch cotton to arrive per S.S. *Peerless* from Bombay. There were two ships named *Peerless* sailing from Bombay and A had in mind one of these ships, whereas B had in mind the other.

It was held that as it was a mistake as to the identity of the subject-matter of the supposed contract, it was a sufficient ground for setting it aside [*Raffle v Wichelhaus*, (1864) 2 H and C 906].

A mistake as to the quality of an article is not material unless it is a mutual mistake, regarding some attribute of the article, without which the article is of an essentially different character from the article in the minds of the parties.

#### Mistake as to nature of transaction

5 Where one of the parties was mistaken as to the nature of the transaction. This is the Common Law defence of *non est factum*, i.e. "it is not his deed", available in certain circumstances to a person who has executed a written document in ignorance of its contents. If the document was a negotiable instrument the party making the mistake should not have been negligent himself. In one case where a very old and infirm man was made to sign a bill of exchange and

where the old man on his enquiry as to the nature of the document was informed that it was a fidelity guarantee bond on behalf of his son, it was held that the old man was mistaken as to the nature of the contract, though not negligent, and, therefore, there was no contract at all. This type of mistake also falls under Section 13.

### Mistake of law

All the above cases deal with mistakes of fact. A mistake of law will not afford a defence unless, as we have seen above, it is a mistake as to foreign law (Sec. 21). The famous maxim of Roman law *Ignorantia facti excusat; ignorantia juris non excusat* applies to a limited degree in India, because here only a mistake as to the law not in force in British India is excused. It does not include any law which is in force in British India. If a person when he entered into a contract did so under a mistake of law which was not in force in British India, it would have the same effect, as we have already seen, as a mistake of fact.

Money paid under a mistake of fact may be recovered and the mere omission to take advantage of the means of knowledge within the reach of the person paying does not disentitle him to recover it, e.g. where A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount (Sec. 72).

### IMPOSSIBILITY

It sometimes happens that an agreement is entered into between two parties which is impossible of performance. This impossibility may be physical or legal, it may either exist at the time the contract was entered into, or subsequent events may make performance of the contract impossible. In the last case the impossibility is called "actual impossibility". Section 56 of the Contract Act says that "an agreement to do an act impossible in itself is void", and in a subsequent paragraph the Section further lays down that even though the act was not impossible, or unlawful, at the moment of time the agreement was made, but becomes impossible or unlawful afterwards, the contract becomes void. The law both in England and India on the question of physical impossibility at the moment of time the contract was entered into is the same, viz that the agreement is void ab initio. On the point of subsequent impossibility there is a difference between the English and the Indian law. According to the Indian law if the act was possible or lawful at the time of entering into the agreement but a subsequent event makes it impossible or unlawful, and if that event is one which the promisor could not prevent, then also the agreement becomes void. In English law, however, if an agreement is possible of performance at the time it is entered into, but an impossibility arises afterwards, that in itself is not an excuse

for non-performance unless expressly so stipulated. Subsequent impossibility, arising from an alteration of law which makes performance illegal, is alone an excuse. The English law, however, says that in particular and exceptional cases where the event which brought about the impossibility is of such a nature that it cannot reasonably be supposed to have been in the contemplation of the parties when the contract was entered into, the plea of subsequent impossibility may be successfully raised.

A special case of supervening impossibility is known as "Frustration". In Anson's words, it occurs "where, through supervening circumstances, performance becomes impossible within the time, or in the manner contemplated by the parties", e.g. prohibition in consequence of war.

Further in case of such agreements, if one of the parties, knowing full well at the time of the agreement that the agreement was unlawful or impossible, enters into the contract without letting the other party know of it, and the other party does not know of it, then the party who knows of this fact would have to compensate the other party for any loss which that party suffers through the non-performance of the agreement (Sec. 56). Thus in India, if A contracts to take a cargo for B to a foreign port and afterwards war breaks out between A's Government and the Government of the foreign port, though the contract becomes impossible at a subsequent date it becomes void when the war is declared. The law even goes further and, as per illustration (e) to Section 56, if A contracts to act at a theatre for six months in consideration of a sum paid in advance by B and if A is too ill to act on several occasions, the contract becomes void on those occasions.

In the above cases, when the contract becomes impossible afterwards, or is discovered to be void, any person who has received any advantage therefrom is bound to restore it or to make compensation for it to the person from whom he received it (S. 65). Thus a party who has paid any amount as a security or deposit in such a contract would be entitled to recover it in the event of the contract becoming impossible. If A contracts to sing for B at a concert for 1,000 rupees which are paid in advance, and A is too ill to sing, A is not bound to make compensation to B for the loss of profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance (ill. S. 65). In English law the claim would be founded on the ground of failure of consideration.

### Appropriation of Payments

Where there are a number of distinct debts owing by one person to another and the debtor makes a payment which is insufficient to discharge all the debts, the rule is that in the first instance it is at the option of the debtor to appropriate his payment to any of his debts he chooses. When the debtor does that expressly, or



by implication, the creditor is bound to appropriate accordingly, if he accepts this payment, otherwise he should refuse to accept the payment altogether; but he cannot receive the payment under protest (Sec. 59). This rule is carried further, e.g. if a creditor has received money belonging to a debtor, without the debtor's knowledge, the debtor shall have the right to appropriate it to whatever debt he chooses within a reasonable time of his (debtor's) coming to know of it.

If, however, the debtor omits to appropriate and there is nothing to show from the nature of the payment or other circumstances as to what debt the amount is to be appropriated, the creditor may appropriate this amount to any lawful debt, including a debt which is barred by the Limitation Act (Sec. 60). If, for example, three simple debts are owed by A to B, viz. (1) a debt which fell due in 1905 for Rs. 500; (2) the other for Rs. 1,500 due in 1910, and (3) the third for Rs. 5,000 due in 1917. A pays a cheque to B for Rs. 3,000 in 1917. If he expressly states that the amount is to be appropriated to the debt of 1917, B must do so, but if by some chance he omits to do so, B may appropriate this amount first to write off Rs. 500 for 1905, *plus* Rs. 1,500 for 1910 and appropriate the balance of Rs. 1,000 only to the debt of 1917, and then give notice of his having done so to A. After this, it would be too late for A to object.

The meaning of the words "there are no other circumstances indicating to which debt the payment is to be applied", is well explained if we take an illustration. If, for example, A owes B three debts, say, of £20 15-5, £10-8-2 and £29-8-2, and sends B a cheque for £29-8-2. Here the nature of this amount and the circumstances would be taken as clearly indicating that the payment is meant to be appropriated towards the third debt even though A does not expressly state that. If, however, there is a current account between the parties and neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, irrespective of any bar under the Limitation Act. If the debts are of equal standing the payment shall be applied in discharge of each proportionately. Where neither party makes any appropriation, the payment is to be applied in discharge of the debts in order of time whether they are or are not time-barred (Sec. 61).

### Novation

The law with regard to Novation is defined by Section 62 of the Contract Act. The section lays down that "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed". The usual and the most common form of novation is substituting a new debtor in place of an old one with the consent of the creditor, e.g. A owes money to B under a contract. It is agreed between A, B and C

that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted. The most essential point in the case of novation is that the original debtor goes out and the liability of the new contracting party is accepted in his place (*Nadimulla v Chanappa*, 5 Bom. L.R. 617.)

### Accord and satisfaction

This is an agreement between the parties concerned by which some new consideration is given by one party to the other in lieu of which the other agrees to give up his rights under the original contract. Here it will be noticed that there is not only an agreement, i.e. "Accord" but also "Satisfaction", i.e. some fresh consideration. Where a creditor is paid earlier and he agrees to take it and allows a discount to the debtor there is an agreement falling under this head. Also where there is a dispute as to the amount due on a contract and a settlement is reached or where a compromise is made under a deed or arrangement in insolvency there is an accord and satisfaction.

### A right to sue on original consideration in case of a Bill or Note

In this connection it should be noted that where a cause of action is once complete in itself and then the debtor gives a promissory note or accepts a bill the creditor has a right either on the note or bill or to proceed on the original consideration, e.g. where A sells goods to B and thereafter B gives A a promissory note or accepts A's draft, A has the option either to sue on the bill or the note, or, if for some reason he cannot do so (say the bill is improperly stamped), to sue B on the original consideration, viz the goods sold and delivered. Where, however, the original consideration is the bill or note as where it is given in consideration of a loan of money made against it, there is only one cause of action.

### Rescission

Section 63 lays down that "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for performance, or may accept instead of it any satisfaction he may think fit." Where a person at whose option the contract is voidable rescinds it, the other party thereto need not perform any promise contained in the contract and the party rescinding the contract shall repair any benefit he may have received therefrom (Sec 64). Here the law contained in Section 63 differs from the English law because in English law every release must be supported by consideration whereas our Indian law does not require a consideration to support a rescission.

Arising from the rule laid down by this section, an agreement to extend time for the performance of a contract does not require

consideration in India to support it on the ground that it is a partial remission of performance.

### Right and Duty of parties when Contract discovered void

If two parties have entered into a contract which they discover to be void, or which becomes void subsequently, the party who has received any advantage under such an agreement must either restore it or must make compensation for it (Sec 65). The object of this section is to adjust a sort of *status quo*, e.g. where A pays B Rs. 1,000 in consideration of B promising to marry C, A's daughter, and C is dead at the time of the promise, the agreement is void, but B must repay A the Rs. 1,000.

### Alterations in a Contract

If an alteration is made in a contract with the consent of all the parties to the contract the original contract need not be performed (Sec. 62), but the new contract in its altered form takes its place. If, however, one of the parties to the contract, while the contract is in his custody, makes an alteration without the consent of the other party either by erasure or addition, and if that alteration is material, the result is that the whole contract is discharged in so far as he is concerned. The consequence is the same if a stranger made this alteration while the document was in the possession of a party to the contract. The only exception that can be pleaded in such a case is that the alteration was made through a mistake or accident. A material alteration is one which alters the legal effect of the contract. Thus where the date of a bond was altered the alteration was material and it was held to avoid the bond. (*Gogun Chunder Ghose v. Dhurondhu*, (1881) Cal 616) Similarly, an alteration on a bill of exchange from D P to D A was held to be a material alteration which avoided the contract (*Mesha Ahonel v. The National Bank of India, Ltd.*, (1903) 5 Bom L.R 524.)

### CONTINGENT CONTRACTS

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen (Sec 31), e.g. A contracts to pay B Rs. 10,000 if B's house is burnt. These contracts cannot be enforced unless and until the contingent event happens (Sec 31).

Often contracts are entered into which are enforceable on the happening of some event or contingency, e.g. an insurance contract where an Insurance Company agrees to pay a certain amount on the destruction, or damage, of the property insured. A builder's right to recover his bill for the work actually done is frequently made by agreement contingent on the architect certifying it as satisfactory, and so on. These contingent contracts are good if the contingency provided for was not impossible at the moment the contract

was made, e.g. where A says to B, "I shall pay you Rs. 1,000 if you marry C's only daughter", and where C's only daughter was dead before A said this, the contract is void because the contingency was in itself impossible at the very inception. If, on the other hand, the contingency was not impossible at the moment of time the contract was entered into, but subsequent events make it impossible, the contract becomes void from that moment, e.g. where A contracts to pay B Rs. 1,000 if he marries C, the contract becomes impossible from the moment of time C dies unmarried and is thus void from that time. But if C does not die but marries some other man, say D, then, also, as provided by Section 34, the contract may be taken to have become impossible and void, even though there is the remote possibility of D dying during the lifetime of B and C and of B marrying C thereafter. On the same principle, if a period is fixed during which the contingency has to happen, the contract becomes void and impossible on the expiration of that period.

### Assignment of Contracts

Generally speaking, the benefits of contracts can be assigned but not the liability or burden. Our Indian Contract Act has no section dealing with assignment of contracts. In England, however, under the Judicature Act a creditor may assign his claim or a person who has a right on any property can assign such right unless the assignment constitutes the alteration of the burden which the contract throws on the assignor. The assignment of a debt must be absolute and in writing which must be signed by the assignor. In addition, the written notice must be given to the debtor of such assignment. In other words the Act makes effectual the assignment of a legal chose in action, i.e. personal\*right on property which can only be claimed or enforced by action and not by taking physical possession. In the case of a bank note, it is a chose in action because the party holding it has a right to recover the money by taking an action in a court of law if the bank refuses the payment, but actual hard cash in the currency of the realm is a chose in possession. There are contracts such as those of policies of life and marine insurance which are assigned independently of the Judicature Act, but in case of such contracts the assignee gets no better rights than the assignor. Bills of lading are assignable under the old Common Law and a bill of exchange or a negotiable instrument is transferable or assignable under the Bills of Exchange Act of England and the Negotiable Instruments Act of India.

There may be devolution or assignment by death or bankruptcy. This is called assignment by operation of law. In case of death the property of a person devolves on his executors if he has died leaving a will naming the executors in it or failing that to his administrators. On the same principle by the operation of the Bankruptcy Act, on bankruptcy of an insolvent debtor all his property vests in the official

assignee in India or the official receiver or trustee in bankruptcy in England. On the same principle if a person is convicted of felony or treason his rights of action during his disability as well as those existing at the time of his conviction vest in an administrator appointed by the Crown.

An actionable claim can always be assigned in India or England, but the assignment in order to be complete and effectual must be made by an instrument in writing. It has also been held in recent cases in India that the interests of a buyer of goods in a contract for forward delivery can be assigned and that such an interest constitutes an actionable claim within the meaning of the Transfer of Property Act (*Jaffer Meherali v. Budge Budge Jute Mill Co.*, (1906) 33 Cal. 702 AFFIRMED IN 34 Cal. 289; *Hunstaaj Moraji v. Nathoo Gangaiam*, (1907) 9 Bom. L.R. 838.)†

## TERMINATION OF CONTRACTS

Contracts may be terminated or discharged by any one of the following methods -

- (I) By agreement. (Accord and satisfaction, novation, waiver.)
- (II) By fulfilment or performance.
- (III) By breach
- (IV) By lapse of time.
- (V) By impossibility. (Frustration.)
- (VI) By operation of law. (Death, bankruptcy, merger)

### Agreement

(1) In cases of discharge by mutual consent, in Indian law, as we have already seen, Section 63 of the Indian Contract Act clearly gives every promisee the power to dispense with, or remit, wholly or in part, the promise made to him. This amounts to a waiver in English law and requires to be in the form of a release under seal if it is one-sided only, i.e. without being supported by a special consideration. It may be added that this section makes it legal in India for a party owing a larger sum to settle the debt in full, of course with the consent of the creditor, by the payment of a smaller sum—a rule which is opposed to that of English law—for the language of Section 63 is so wide that even an oral declaration releasing or promising to release becomes binding.

We have also seen, under Section 62, that a novation, i.e. a substitution of a new agreement, discharges the parties with regard to the liabilities on the original contract which now need not be performed.

It also happens that a contract may contain a clause in which it is clearly provided that, on the happening of a certain event the contract is to terminate, then in such a case the happening of the event contemplated brings such a contract to an end and discharges the parties concerned as provided for in the agreement.

### Fulfilment or Performance

(II) Performance or fulfilment of a contract ought to be strictly in accordance with the requirements of law as laid down in Sections 37 and 38 of the Indian Contract Act. (Section 37 clearly states that in order to claim performance the parties to a contract must have **actually performed** the contract, or must have shown that all the time they were **ready and willing to perform** their respective promises.) In case where the promise is of a nature that by implication, or by the nature of the contract, personal performance is agreed upon, then the person concerned must actually perform or must be willing and ready to perform this part personally. He cannot in such a case delegate his work to others. The law expects every person who claims to sue on a contract on the ground that he performed his part, or was ready and willing to do so, to prove (1) that his performance or offer of performance was unconditional, (2) that it was made at a proper time and place and that the person to whom it was made had a reasonable opportunity to ascertain such a willingness, and (3) if the performance constituted a delivery of anything, it must be shown that the other party was given a reasonable opportunity of seeing that the thing offered was the thing which the promisor had bound himself by his promise to deliver. An offer to one of several joint promisees has the same legal consequence as an offer to all of them. In case the performance is by payment, the payment must be absolute and of the exact amount due in the legal tender money of the country. Besides this the money should actually be shown, as a mere letter offering to pay would not amount to a valid tender. The tender should be made at the proper time and place. If a cheque is offered in payment a creditor is not bound to accept it; but if he once accepts, it will be a valid tender and that fact cannot afterwards be taken as a ground for not performing the contract. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract that order must be followed, if not the order which the nature of the transaction requires may be followed (Sec. 52). We have seen that a contract must be performed at the proper time and place. The contract generally fixes the time at or before which the agreement has to be performed and thus time is said to be made the essence of the contract. In such a case failure to perform his part of the contract by one of the parties within the specified time limit makes the contract or so much of it as has been performed, voidable at the option of the injured party. If, on the other hand, it was not intended that time was to be of the essence of the contract, though the date was specified, the failure to perform will not make the contract voidable at the option of the other side, but all that the injured party will be entitled to are damages or compensation (Sec. 53).

## TIME IS THE ESSENCE OF THE CONTRACT

This rule as to the intention of the parties to make time the essence of the contract applies differently in cases of contracts for the sale of land and those for the sale of merchandise. In the case of the former the intention has to be expressed in unmistakable language, as otherwise, equity presumes that the time of performance was not intended to be of importance. In mercantile contracts, however, the presumption is quite the other way. When merchants mention time and dates in their contracts they are taken to mean and intend that the stipulation has to be strictly carried out.

## RIGHT TO DEMAND RECEIPT

In connection with payment and legal tender another interesting question which, though of an academic type, may arise in practice or examination is, whether the person making a legal tender payment can demand a receipt from the payee. This question arises because the person who has to perform his contract by a payment has to make an unconditional payment and if a receipt is demanded, it is argued that it would not be an unconditional payment. As we have already stated, such a position seldom arises in actual practice and has not been therefore the subject of judicial interpretation.

It is, however, thought that as the Stamp Act, Section 30 throws an obligation upon a person receiving money exceeding Rs. 20 in amount to give on demand a duly stamped receipt for the same and makes a breach of such obligation an offence under Section 65 of the Act, the debtor while paying the amount can demand receipt and withhold payment until such receipt is given. The position, however, is doubtful as we have already noticed above, as no decision has been given on the point.

The other point with regard to receipts which should be remembered is that a receipt is not conclusive evidence that the money stated to have been paid was actually paid. In other words, though it is a very strong evidence of payment it may be challenged and the party challenging can prove by satisfactory evidence to the Court that no actual payment was made though the receipt was passed.

The following receipts are exempt from Stamp Duty:—

(1) Receipts given on behalf of Government, (2) receipts given for bank deposits, (3) money paid without consideration, (4) receipt given by a cultivator, (5) receipt given in connection with pay of army or police, (6) receipt given for pension to the military, (7) receipts for land revenue collections, (8) receipt endorsed on or contained in any instrument duly stamped.

## Breach

(III) Section 39 says that "When a party to a contract has refused to perform, or has disabled himself from performing his promise

in its entirety, the other party may put an end to the contract unless he has signified by words or conduct his *acquiescence in its continuance*." From this it follows that if one of the parties breaks the contract the other party, if he has not acquiesced in it, may, at his option, declare the whole contract to be at an end. The section gives an illustration of a singer who agreed to sing for eight nights in a theatre. She sang for the first five nights but on the sixth she willfully absented herself. Here the theatre manager has the option to put an end to the contract altogether. But if he allows her to sing again on the seventh night he will have acquiesced in the continuance of the contract with the result that though he cannot claim to put an end to the contract he can still insist upon being compensated for the damage sustained by him.

The breach of a contract may be in one of the following ways —

(1) By renunciation of liability by one of the parties before the time of performance. Here the renunciation must refer to the whole contract.

(2) By one of the parties through his own conduct making it impossible to perform a contract, e.g. when a man who has agreed to sell or deliver his horse, sells and delivers it to a third party before the delivery day prescribed by the previous contract.

(3) Where one of the parties has partly performed his part, and the opposite party refuses to allow him to complete performance, e.g. where A agreed to sell and deliver to B 50 tons of coal and actually delivered 20 tons, after which B refused to take any more coal. Here A is discharged from delivering a further 30 tons and also acquires a right to sue B for compensation for the breach.

(4) When one of the parties fails entirely to perform his part.

With regard to the renunciation or repudiation of the contract, it must be an absolute and clear refusal to perform and abide by the whole contract and must be accepted by the other side. When, therefore, (in *Hithers v Reynolds*, (1831) 1 L.J., K.B. 30), R agreed to supply W with straw to be delivered at W's premises in a certain quantity every fortnight during a specified time and W agreed to "pay Rs. 33 per load for each load of straw so delivered", and after the straw had been delivered for some time W refused to pay for the last load delivered, insisting that he would keep one payment in arrear, it was held that as here according to the agreement *each load had to be paid for on delivery*, the refusal of W to do so in future was a breach. It must, however, be noted that here there was an actual refusal to pay. If, however, there was only a failure to pay one out of a series of payments that will not amount to a repudiation of the contract. Again, to bring the case within this rule, the repudiation should have been accepted by the other side; e.g. in one case it was agreed between A and B that A's ship should go to Odessa and there load a cargo. In Odessa B's agent failed to offer a cargo, saying he had none to load. The captain of the ship



as A's agent refused to take this refusal and insisted upon the cargo being loaded. In the meantime war broke out between England and Russia and B took up the defence that the contract was dissolved. It was held that as the refusal was not taken there was no breach or renunciation and therefore B's defence was held good. (*Avery v. Bowden*, (1816) 5 E. and B. 714.) This is because where there is an anticipatory breach, i.e. one party renounces before the time for performance, it gives the other party an immediate right of action. If he does not act at once, any subsequent risk will fall on him.

### 'Quantum meruit'

With regard to part performance of a contract, it will be interesting to take up the effect of the maxim which lays down the law with regard to the rights of the party who has performed that part, to sue and recover for the actual work done *quantum meruit* (according to merit). Whether a person can sue or recover a *quantum meruit* depends upon the nature of the contract. If the work is an entire work for a specified sum and the entire work is not carried out, there would be a breach which would excuse the other side, and the party who fails to carry out the work cannot sue with a view to recover the value of the actual work done, e.g. if a builder abandons an entire contract to erect a building after erecting a portion of it, he cannot recover anything on account of the finished work; even though the owner of the building takes up the work done and finishes it from the point let off by the contractor. This is because here the performance of the whole work is the essence of the contract. If, on the other hand, the contract is of a divisible nature, e.g. supply of 100 bales of cotton, the person who has performed a portion of the duty on such a contract by supplying 25 bales and failing to supply the rest, may sue on the *quantum meruit* of the actual bales delivered.

### Lapse of time

(IV) Although under the Limitation Act the efflux of time does not actually terminate the contract, it, in effect, in depriving the party of his remedy at law to enforce, brings about the same result. The period of limitation is three years in ordinary contracts (in England it is six years) and twelve years for specialty contracts.

### Impossibility

(V) Section 56, Indian Contract Act, clearly lays down that if a contract which was possible of performance becomes subsequently impossible by reason of some event which the promisor could not prevent, or becomes unlawful, the contract immediately becomes void. This is also known as frustration of the contract brought about by supervening impossibility,

### Operation of Law

(VI) By operation of law. Contracts here may terminate under three circumstances: (1) By **Merger**, i.e. where a party or parties embody an inferior contract in a higher contract, e.g. where a judgment has been given in an action for debt or breach of contract and a decree obtained, the original right becomes merged in the higher right under the Court's decree and no subsequent action can lie between the same parties for the same cause of action. (2) In **Insolvency**, i.e. where the Insolvency Commissioner passes an order to discharge the insolvent, which order exonerates or discharges him from liabilities on all debts incurred previous to his adjudication. (3) By an unauthorized alteration or loss of a written document.

### BREACH OF CONTRACT AND DAMAGES

When a contract has been broken, the party who suffers such a breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby. If he can prove substantial loss, he will get substantial damages—otherwise he will only get nominal damages. Such compensation, however, is not to be given for any remote and indirect loss or damage sustained by reason of the breach (Sec. 73). Damages may be divided into two classes, viz. (1) **General**, and (2) **Special**.

#### GENERAL DAMAGES

**General Damages** are implied by law and are, therefore, always recoverable on a breach of contract; whereas **Special Damages** are only recoverable when they are either specifically provided for, or where the other side was aware of their probability. According to the rule in *Hudley v. Baxendale*, 9 Ex. 341, when a plaintiff proves that the breach of contract has caused him actual loss, he is only entitled to those damages which (a) naturally arose in the usual course of events arising from such a breach, and which (b) both the parties knew to be likely to result from the breach at the time they made the contract. Damages which do not fall within the rule of *Hadley v. Baxendale*, are said to be too remote. In estimating such damages the means which existed of remedying the inconvenience must be taken into account; e.g. A hires B's ship to go to Bombay, and there to take on board, on the 1st of January, a cargo which A is to provide and bring to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense (Sec. 73). The simplest example would be—A agreed to sell B 5 bales of Branch cotton at, say, Rs. 900 per bale, the delivery to be

given on 15th January 1917. A fails to give delivery. The remedy of B would be to claim the difference between the market price and the contract price for the same quality of cotton in case the market price is higher than the contract price. (*Williams Bros v Ed T Igins Ltd* (1914) 40 Cas 510). This market price means a price charged to an ordinary customer and the fact that one of the parties could have obtained goods through some particular arrangement at a lower price is no argument. If there is no market rate for the subject matter of the contract the value must be taken on the basis of the price which has to be paid for the nearest substitute. Failing any substitute being there, the market price will be ascertained by adding to the price at the place of purchase the expenses of getting them to the place of purchase *plus* the usual profit of the importer. (*Hop & Moulton v Wilson & Co* 41 Moul 719). If the buyer waits after the time of delivery at the unjust request of the seller to give time and then fails to deliver and in the meantime the market rises, the damages would have to be paid on the scale of the higher price. (*Ogle v Farlane* 1 R 3 QP (1127)). If on the other hand, the goods were to be shipped or forwarded to some other place, the damages would be computed on the basis of the price procurable in that place *minus* the cost of transit.

### SPECIAL DAMAGES

Special damages arise under special circumstances where the party to the contract has made a specially advantageous bargain through which he expects to make specially large profits which profits are likely to be lost through the breach of the contract. Special damages are only recoverable if (a) the special circumstances were known to both the parties at the time of making the contract and (b) the damages are such as would naturally result from the breach of a contract so made. To take an illustration, A has entered into an advantageous contract to supply iron rails to a Railway Company which he covers by a contract with an Iron Company. These rails are to be delivered at dates specifically stipulated. A expects to make a large profit on the difference. The Iron Company fails to keep the contract (and thus the Railway Company rescinds its contract) with A. The price at which A was to supply these rails to the Railway Company was much higher than the market rate on the dates of delivery. In this case A can recover only the difference on the basis of the market price from the Iron Company unless A had made it clear to his seller (Iron Company) that the breach of contract by them would involve him in a special loss through his failure to keep the advantageous contract. Thus what is required here is that the special circumstances under which the party expects to make a special loss through the breach of contract by the other side must be communicated if special damages are to be recovered. Here also

It must be noted that if A could have bought those rails in the market in sufficient quantity to meet his buyer, the Railway Company, he should have done that in order to mitigate the damages, because "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly".

### Exemplary Damages

Exemplary damages are specially **penal and heavy** damages awarded by courts in cases such as a **breach of promise to marry** where the injured feelings of the party aggrieved are also taken into account and in actions against **bankers** for refusing to honour a customer's cheque when they have funds of his to meet it. Exemplary damages are not recoverable in the case of the breach of mercantile contracts because the main object of law here is to compensate the party aggrieved and not to punish the other side.

### Liquidated Damages and Penalties

Liquidated damages are damages which the parties by mutual agreement have fixed at the time of entering into the contract and stated in the agreement as the compensation which, in case of the breach, the injured party should receive. The court is not bound by such a figure which may be mentioned and may allow a lesser amount but will never allow a larger damage than that so fixed. It will thus be seen that there is no advantage in fixing such a liquidated damage in actual practice.

Section 74 of the Contract Act clearly lays down in this connection that "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for". It further states that "A stipulation for increased interest from the date of default may be a stipulation by way of penalty". A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the court considers reasonable.

### INTEREST

With regard to interest the law in India has been that, in case it is agreed that a certain rate, say 8 per cent, is to be paid by way of interest and that the principal with interest at that rate

has to be paid on a particular date, with a stipulation that if the money is not paid on the due date, interest at a higher rate, say 12 per cent, would run *from the due date of payment*, it would not amount to a penalty. It would amount to a penalty if it were stipulated that the higher rate in case of default was to be calculated *from the date of the loan or contract*.

### Interest by Way of Damages

In the Interest Act of 1839 it is laid down to the effect that in case a debt or certain sum is due by any written instrument on a particular date, the court may, at its discretion, allow interest on it at the usual current rate. If the sum is payable otherwise than under a written instrument the court may allow interest at once the sum is due. The creditor makes a demand in writing giving notice to the debtor that interest will be claimed from the date of such demand to the date of payment.

### Excessive Interest

Before the passing of the Usurious Loans Act, 1918, the courts in India had no power to interfere and reduce interest in case an excessive rate was provided for on a loan or any other transaction. This naturally led to great hardship and decrees were frequently passed allowing claims for interest at absurd percentages. The Usurious Loans Act (Sec. 3) however provides that where—

“in any suit to which this Act applies, whether heard *ex parte* or otherwise, the court has reason to believe—

- (a) that the interest is excessive and
- (b) that the transaction was, as between the parties thereto, substantially unfair,

the court may exercise all or any of the following powers, namely—

- (i) reopen the transaction take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest,
- (ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof,
- (iii) set aside either wholly or in part, or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just.”

These powers will not of course allow a court to reopen a transaction already closed.

It will thus be seen that the courts can even on their own motion interfere in those cases where in their opinion the transaction is "substantially unfair." In considering whether the interest is excessive the court is expected to take into consideration the risk incurred as on the date of the loan from the creditor's standpoint and for that purpose the presence or absence of security, its value, financial condition of the debtor, and the result of previous transactions (if any) of the debtor must be taken into account.

## CHAPTER IV

### BAILMENT

**BAILMENT** is defined by Section 148 as the "delivery" of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee",

#### Explanation

"If a person already in possession of the goods of another contracts to hold them as bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods although they may not have been delivered by way of bailment."

In a case where the thing delivered is not to be returned the transaction cannot be called a bailment. The bailment may be either by way of deposit, in which case the person to whom it is delivered has no right to use it, or the goods may have been delivered with the bailor's consent for gratuitous use or by way of hire or pawn. In short, the goods here are delivered for a temporary purpose. In case the goods bailed carry some defect which is likely to expose the bailee to any extraordinary risk, or is likely to interfere with his use, the bailor must disclose such faults, failing which the bailor would be responsible to the bailee for damages arising out of such a defect, with this difference, that, in case the goods are bailed for hire the bailor will be responsible irrespective of the fact that the bailor was not aware of the existence of such defect; e.g. A lends a horse to B knowing it to be vicious; A must disclose this fact, even if the bailment was gratuitous, to B, otherwise in case of injury to B, A would be responsible for the damage sustained. If, on the other hand, the horse was hired, A would be responsible for damages even where A was ignorant of the defect (Sec. 150).

#### Paid or Gratuitous Bailee's Responsibilities

Where the goods are left with the bailee, the bailee must take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed (Sec. 151). The Indian law thus does not recognize any degree of care, as in the case of English law, but clearly states that the bailee must take as much care of the goods as a man of ordinary prudence would take of his own goods of the same bulk, quality and value. The English law,

on the other hand makes distinctions as to the degree of care, differentiating negligence into "ordinary" and "gross", according to whether the bailee is a gratuitous or a paid bailee. The bailee here is responsible not only for loss caused through his own negligence but also for that caused through the negligence of his servants in the regular course of their employment. If on the other hand, the loss is caused through the act or default of a third party, the bailee would not be liable if he can show that the loss could not have been prevented even with reasonable care and diligence. The same would be the case if the bailee's servants caused the loss or damage, while acting outside their ordinary course of employment under him. On the same principle the liability of a guest in a hotel or inn with regard to the furniture he uses is the same as that of a common bailee. (*Rampul Singh v. Murray and Co.* 2 All 161) & In the case of an innkeeper also, according to Common Law he is liable for loss in connection with the luggage or articles belonging to his guests if the loss is caused through the negligence of the innkeeper or his servants. Here the presumption is that when the loss occurred it was caused through the innkeeper's negligence, unless the contrary is proved.

### BAILMENT FOR REWARD

Cases of bailments for reward are divided into two classes viz (1) those in which a reward is received by the bailor and (2) those in respect of which the reward is to be received by the bailee.

#### Reward to Bailor

Where the bailor receives a reward from the bailee as in the case of a taxicab driver who took the taxi used it paying 75 per cent of the receipts to the owner of the taxicab even though the driver wore the uniform of the owner of the taxicab and bought his petrol from the owner out of his receipts it was held that he was a bailee and not a servant. (*Smith v. General Motor Cab Co.*, (1911) 27 TLP 317). The other example of a bailment for reward to the bailor arises in cases of contracts on a hire and purchase basis where the bailee in consideration of paying a certain number of hires is entitled to become the owner of the bailment on paying all the hires.

#### Reward to Bailee

This happens where goods are warehoused with a *mercaderum* or a warehouseman, who gets a certain hire for storing them on behalf of the merchant owner during the period they remain in his custody. Another case is where an article is entrusted to be worked upon, as for example where a watch is left with a watch repairer for repair, or gold and diamonds are left with a jeweller to be made



into an ornament, as the watchmaker in the first case, or the jeweller in the second, becomes a bailee for reward.

### Railway Companies as Bailees

Railway companies entrusted with goods in India to be carried from one place to another are bailees with liabilities as per Sections 151, 152 and 161 of the Contract Act (Sec. 72, Railways Act, 1890). In England, however, they would fall under the special responsibilities thrown on common carriers which responsibilities are higher than those of an ordinary bailee. Most of the railway companies issue what is known as the "risk note" which is made out in a form approved by the Governor-General in Council and has to be signed by the owner of the goods, under which, in consideration of the company agreeing to carry the goods at a specially reduced rate, the owner of the goods exonerates the company from all risks in transit. The usual form used by the railways in India lays down to the effect that in consideration of the goods being charged for at a special reduced rate the owner of the goods agrees to hold "the railway company and their agents harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the bales from any cause, except for the loss of a complete consignment or of one or more complete packages forming part of the consignment due either to the wilful neglect of the railway company or to theft by or to wilful neglect of their servants, or agents, before, during or after transit". Some "risk notes" provide further that the term "wilful neglect" should not be held to include fire, robbery from a running train, or any unforeseen event or accident. It will thus be seen that in case such a risk note is given by the consignor he can recover only in case the goods were lost through the "wilful neglect" of the company's servants or theft by such servants. If the consignor makes out a *prima facie* case, the company must prove that there was neither such wilful default nor theft. In other words, the burden of proof is thrown primarily on the plaintiff. (*The Central India S. & W. Co., Ltd. v. G. I. P. Railway*, 24 Bom. L.R. 272; *B. B. & C. I. Ry. v. Sakarchund*, 24 Bom. L.R. 787; *H. & C. Smith Ltd., v. G. W. & Co.*, (1921) 2 K.B. 237 and (1922) 1 Ap. Cas. 178.)

A risk note is properly signed if signed by the authorized representative in his own name. Attestation by witnesses though provided for in Form H is not necessary. The term "fire" as used in this form is not *eiusdem generis* with the words "any unforeseen event" as used there. The company's liability comes into operation as soon as goods are tendered and accepted even though no receipt is given. (*G. I. P. Ry. Co. v. A. B. Tamboli*, 28 Bom. L.R. 718.) It has also been held that when goods are carried by several carriers in succession and they are consigned to one of them and there is short delivery at the destination, the fact that loss occurred when they were carried by one of the other carriers does not absolve the

last carrier because the contract here was one and indivisible. (*India G N & Ry Co v Gunthardal Girdhan Dar*, 54 Cal 430) It has also been decided in a Bombay case that where packages were received safe but the contents of some were missing, the railway company was not liable though wilful default was proved.

It is, again, the duty of a bailee to act with regard to the goods bailed strictly in accordance with the condition of the bailment. If not the bailor would be at liberty to declare the bailment void at his option. *e.g.* A lends to B his horse for hire for his own riding, but B drives the horse for his carriage. This breach of condition gives A the option to terminate the bailment (Sec. 153). He is also entitled to claim the damages, if any that may arise through this breach of condition (Sec. 151).

### Mixing up of Goods Bailed

If the bailee mixes the goods of the bailor with his own with the consent of the bailor, the bailee shall have an interest in the mixture in proportion to their respective shares but if the mixture is made without the bailor's consent and the goods can be separated or divided the bailor can claim his share of the mixture and the damages, if any, arising from the mixture. If on the other hand, the goods cannot be separated the bailee would have to make compensation for the loss of the goods (Secs. 155, 156 and 157).

### Termination of the Bailment

When the purpose for which the goods were bailed, or the time for which they were so bailed has expired, the bailee must return the goods bailed without demand, and if he does not do so, he would be responsible to the bailor for any destruction, loss, or deterioration caused to the goods from that time. If, however, the goods are lent gratuitously the bailor has the right to request their return at his pleasure even though he lent them for a specified time or purpose. The subject to this exception, that where relying on such a loan made for a specified time or purpose, the bailee has acted in a manner, as would cause him loss through the return of the goods before the time stipulated, exceeding the benefit actually derived by him from the loan, the lender or bailor must, if he compels the return, indemnify the borrower for the amount by which the loss so occasioned exceeds the benefit so derived. A gratuitous bailment also terminates at the death either of the bailor or the bailee (Secs. 154, 160, 161 and 162). It is further laid down that in the absence of a contract to the contrary, not only is the bailee bound to return the goods bailed, but he should also hand over the increase or profit, if any, which may have accrued from the goods during the bailment, *e.g.* where A leaves a cow in the custody of B to be taken care of and the cow has a calf, B is bound to deliver the cow as well as the calf to A (Sec. 163).

**Bailment by Joint Owners**

Where the bailed goods belong to several joint owners, the bailee may deliver them to, or according to the directions of, any one joint owner, without the consent of all, provided there is no agreement to the contrary (Sec 165).

**Title of the Bailor**

If the title of the bailor was defective and unknown to the bailee, the latter would not be responsible if he returns the goods to the bailor in good faith (Secs 165 and 166). Of course, the third person who claims the goods bailed may apply to the court to stop delivery to the bailor with a view to decide the title in dispute (Sec 167).

**A Finder of Goods**

On the same principles, "A person who finds goods belonging to another and takes them into his custody is subject to the same responsibilities as a bailor" (Sec 71).

**Rights of a Finder of Goods**

The finder of goods is subject to the same responsibility as a bailor and is entitled to retain the goods against the owner until he receives compensation for the trouble and expense he may have voluntarily incurred with a view to preserve the goods and to find out the owner. He has **no right**, however, to sue the owner for the trouble and expense. His remedy is **only retention** with a view to compel the other side to pay. If, on the other hand, a **specific reward was offered** for the return of lost property, the finder would then acquire the right both of suing for such a reward and of **retaining** the goods until the reward is received. The Indian law thus gives the finder a lien on the goods for his expenses and the reward, but in English law the finder has no lien on the goods though he has a right to claim compensation from the owner (Sec. 168). Where the owner cannot be found with reasonable diligence, or where he is found, but refuses upon demand to pay the lawful charges of the finder, and where the thing so found is in danger of perishing, or losing the greater part of its value, or where the lawful charges of the finder amount to two thirds of the value of the goods found, the finder is entitled to sell the goods (Secs 168 and 169).

**Bailee's Claim for Service**

The bailee who has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, has also the right to retain the goods until he receives full remuneration for the service rendered in the absence of an agreement to the contrary (Sec. 170). It must,

however, be noted that the service rendered must involve skill or labour, and therefore a person who takes in animals only to feed them does not come under the rule, but a horse broker or veterinary surgeon, who uses skill or labour would be the proper person to put forward such a claim.

### Particular and General Lien

The lien which we have hitherto dealt with is called the **bailor's particular lien** is that from the **general lien of bankers, factors, wharfingers, attorneys and policy brokers** who can retain against general balance of account goods or securities, or papers bailed to them unless there is an express agreement to the contrary (Sec. 171). **General lien** is a right which has arisen by custom in particular trades or professions or by contract to retain goods or other security or valuables which come into the possession of these parties in the **regular course of their business or profession** for any money which may be owing to them by the owner to whom these goods, valuables or securities belong. Thus bankers have a general lien on cash and securities belonging to their customers which are deposited with them in the regular course of their business as bankers, for any money that may be due to them as bankers. If however there is a specific agreement with the banker to the effect that he will not have a general lien on that he gives up same that will be binding (*Kunhu Maan v Bank of India* 19 Mad. 34). It may be added that in case of valuables or securities deposited only for safe custody, this lien does not arise. With regard to securities on which the banker is given the power to collect interest and dividend however, such a lien would extend. But the lien would not extend to title deeds casually left with bankers on which the bankers had previously refused to make an advance. On the same principle an attorney or solicitor of the High Court has a lien on all papers and documents belonging to his client that may be in his possession in his professional capacity for which fees are due to him. It may be noted here that the solicitor who is discharged by his client has a lien for his costs but one who discharges himself by refusing to act has not. An accountant, generally speaking has a lien on books of accounts for his fees that may be due to him in connection with the work he has done on those books. It is however considered doubtful whether this right can be exercised by him on books belonging to a joint stock company incorporated under the Indian Companies Act, as these books happen to be statutory books.

It is also considered doubtful whether an auditor has any right of general lien on the books he has audited even though he may have possession of them. In the case of wharfingers dealing with the goods as wharfingers a general lien on these goods arises for their charges (Secs. 170 and 171).

## CHAPTER V

### PLEDGE

**PLEDGE** is defined a bailment of goods as **security** for the payment of a debt or performance of a promise. The bailor here is called the 'pawner' and the bailee the 'pawnee' (Sec 173). Any class of goods valuable documents etc. may be made the subject-matter of a pledge. There must be however a constructive or actual delivery.

The pawnee has a right to retain good pawned with him until the debt for which the pawn is created is paid or the promise for the performance of which the pledge was made is fulfilled. This right extends to the interest on the debt /<sup>the</sup> expenses. These expenses include all expenses incurred by him in preserving the goods (Sec 173, 174 and 175)

#### Pawner's Default

Where the pawner makes default in the payment of his debt or the performance of his promise at the stipulated time in respect of which the goods were pledged the pawnee may (1) bring a suit against the pawner upon the debt or promise and retain the goods pledged as collateral security or (2) he may sell the thing pledged on giving the pawner reasonable notice and if the proceeds of such a sale are less than the amount due he can recover the balance from the pawner. If on the other hand there is a surplus he should return the excess to the pawner. From this it must not be thought that because there has been a default by the pawner his right to redeem the pledge has been lost. The right on the contrary continues until the actual sale of the good and therefore the pawnee can redeem the goods pledged at any time before the actual sale, on payment of additional expenditure, if any, that may have been the result of his default. It may be added here that in this case the pawnee is allowed to sell without a reference to the court. The period of limitation in case of a loan on a pledge is three years from the date of the loan. In the case of a promise, however for the keeping of which the pledge is made the years run from the date of the breach of the promise (Secs 176 and 177)

#### Who may Pledge

Of course the owner may pledge his goods but besides that the goods, as well as the documents of title in connection with them, may be pledged by any person who is in possession with the consent of the true owner. Thus a bill of lading, a dock warrant, a ware-

house keeper's certificate, a wharfinger's certificate, or warrant or order for delivery, or any other document may be pawned in the above case and the pledge would be valid as long as the pawnee acts in good faith and the goods or documents have been obtained from a lawful owner without offence or fraud (Sec 178). It should be noted here that what is meant is that the article should be in possession as distinguished from mere custody without authority to deal with same. A servant left in charge of the goods of his master or a wife left in charge by her husband, cannot pledge them (*Raddomoye v Siturani* 4 Cal 497 / *H Seager v Pookma Kessa*, 24 Bom 458). If the interest of the pawnee is limited he can pledge the goods or the documents to the extent of his interest. It may be added that if a third person injures the goods pledged, or deprives the bailee of the use or possession of them the bailee is entitled to all the remedies that the owner may have had in a like case if no bailment had been made. In short either the bailor or the bailee may bring a suit against the offending third party. The compensation obtained in such a suit is divisible between the bailor and the bailee according to their respective interests.

### **Difference between Pledge and Mortgage of Goods**

In the case of a pledge, the possession of goods but not their ownership passes to the creditor or pawnee whereas in the case of a mortgage of goods, it is the property in goods i.e. the ownership, which is transferred to the mortgagee conditionally, the possession until default generally remaining in the mortgagor.

## CHAPTER VI

### SALE OF GOODS

The new Indian Sale of Goods Act of 1930 came into force on 15th March 1930. The new Act more or less follows the English model and repeals Chapter VII of the Contract Act of 1872.

#### Goods

**"Goods"** are defined by the new Act as every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

**"Specific goods"** means goods identified and agreed upon at the time a contract of sale is made.

#### Sale and Agreement to Sell

A contract of sale is defined as follows:

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part owner and another. [Section 4 (1)] A contract of sale may be absolute or conditional. [Section 4 (2)]

Whereas a contract to sell is defined by Section 4 (3) of the Act as

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

#### Sale and Bailment

The difference between a sale and a bailment is that in the case of a sale the delivery of the article is made against a price in money or any other valuable, and that the identical thing is not to be returned. In other words, a transfer of property for money, or some other valuable in exchange is a sale and not a bailment. In the case of a bailment the identical property which is the subject matter of the bailment is to be returned to the bailor.

#### Hire and Purchase Agreement

Where A hires a sewing machine agreeing to pay a fixed amount of rent for the use of the machine, with a stipulation that should A pay a certain amount in cash at any time during the hire, he shall become the purchaser of the machine, provided he had regularly

paid the rent, such an agreement is only an agreement for hire and A does not become a purchaser until the conditions as stated above are fulfilled. [*Gopal Fakharam v Sorabji Navarwanji*, (1904) 6 Bom. L.R. 871; *Helby v Matthews*, (1895) 64 L.J. Q.B. 465]

The main principle to be noted in case of hire and purchase agreement is that the purchaser has the option to pay a certain number of rents and after he pays the stipulated number he becomes the owner of the property, but he should also be quite free to stop paying the rent and to return the property hired at any time he likes, i.e. the property does not pass until the last rent is paid. To take an illustration, A hires a piano to B on the agreement that B should pay Rs. 100 a month as rent. A further stipulation is that if he pays rent regularly for twenty months, the piano shall become his property at the end of the twenty months, but if B likes he can return the piano at any time, say after using it for two months, and he need not pay any more rent. This is a hire and purchase agreement proper. If, however, it is agreed that twenty months' rent must be paid and that he cannot return the property, the agreement is a sale not hire and purchase (*Cecil Cole v Nanulal Morari*, 49 Bom. 177). Such a sale is better known as a sale on the instalment system and here the property passes immediately on the completion of the agreement whether any or all the instalments are paid or not.

### Memorandum in Writing

In English law, under the English Sale of Goods Act, contracts for the sale of goods for £10 or over are required to be in writing unless there is a part payment of the price or part delivery of the goods. Thus, in case of an agreement for sale of goods of the value of £10 or more it is not enforceable in England in a Court of Law, unless -

- (1) the party to be charged has given some memorandum or note in writing of the contract under his signature or that of his agent or
- (2) the buyer or his agent has accepted part of the goods so sold and actually receives some of
- (3) the buyer or his agent has made part payment on account of this contract, or
- (4) the buyer or his agent has given something by way of earnest in order to bind the agreement of sale.

Such a rule, however, does not prevail in India

### Barter

The student must have thus seen that a sale must be an exchange of goods for cash, that is a price. The price is the payment made in money for the goods purchased. Exchange of goods for goods is not a sale but a barter. According to Lord Blackburn, the legal effects of a contract of sale and of a barter are the same.



**CONTRACT OF SALE**

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The delivery may be either immediate or future and the payment may be either in cash or at some future date or in instalments. The actual contract of sale may be made either in writing or by word of mouth or partly in writing and partly by word of mouth subject to, of course, the provisions of any law for the time being in force. Writing, of course, will include printing, lithography, photography and other modes of representing or reproducing words.

**Contracts required to be in Writing under  
English Statute of Frauds**

When we are on this question of contracts required by law to be in writing, the students for the English examinations may as well study the contracts required under English law to be in writing other than those for the sale of goods. They are—

- (1) a promise by an executor or administrator to answer damages out of his own estate,
- (2) a promise to answer for a debt, default or miscarriage of another,
- (3) an agreement in consideration of marriage,
- (4) a contract concerning lands, tenements, hereditaments or any interest therein, and
- (5) an agreement that has not to be performed within the space of one year from the making of it.

These contracts need not necessarily be on one piece of paper, but may be written and extended over several pieces, provided that they are so connected and consistent that they can be read together as one contract. They must, of course, be signed.

**Ascertained and Unascertained Goods**

The exact definition of ascertained goods is not given by the Act, but they are more or less on the same footing as specific goods, though the word "ascertained" is really of a wider import. Considering all the authorities, ascertained goods are those goods which are in a deliverable condition at the time of sale or are put in a deliverable condition after sale and unconditionally appropriated to the contract, and the buyer or his agent assents to the said appropriation or note of the said appropriation has been given to him. The Act lays down that when the sale is of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. If, on the other hand, the sale is of specific or ascertained goods, the property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred (Sec. 19). Now on the question of intention, it is laid down that if there is any unconditional contract

for the sale of specific goods in a deliverable state, the property passes immediately to the buyers on the contract being made, even though the time of payment of the price or the time of delivery of the goods, or both, are postponed (Sec 20). If, however, a seller of specific goods has to do something with the goods for the purpose of putting them in a deliverable state the property does not pass until such thing is done and the buyer has notice thereof. As for example, if it was agreed between A and a motor car dealer that the car was to be painted blue before delivery the car does not become an ascertained article until the manufacturer has done what he was asked to do. On the same principle if A were to buy five tons of coal out of a ware house where a large quantity was stored, the goods would not be ascertained until the five tons bought by A were weighed out and laid aside as goods to be taken a livery of by A. The same rule will apply where in the case of specific goods the seller is bound to weigh, measure, test or do some other act with reference to the goods for the purpose of ascertaining the price. As for example, if A sells a specific lot of coal, but it has to be weighed with a view to ascertain the price at, say, Rs 100 per ton until the said lot is weighed and the price is ascertained and the buyer is informed of it the property does not pass. The importance of finding out the exact moment of time at which the property passes from the seller to the buyer lies in the fact that the moment the property passes to the buyer, the risk in the goods is transferred to the buyer also. Thus even though the goods remain after that event in the hands of the seller and they are destroyed by some accident the buyer has to bear the loss and not the seller. As for example, where A bought a horse from B and requested B to keep it in his (B's) stable until the next day and in the interval the horse was accidentally killed by a fire which broke out in B's stable, the loss fell on the buyer, A.

In the case of unascertained or future goods by description when sold, the rule is that if such goods are acquired by the seller, put in a deliverable state and are unconditionally appropriated to the contract with the assent of the buyer the property in these goods also passes to the buyer. The assent of the buyer may be either express or implied or may be given either before or after the appropriation is made. On the same principle when the seller delivers the goods to the buyer or to a carrier or a bailee, for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract (Sec 23). The four requirements or conditions precedent here, in order to make the property pass from the seller to the buyer, are that—

- (1) the goods correspond with their description in the contract,
- (2) they are put in a deliverable state,
- (3) they are unconditionally appropriated to the contract, and

- (4) both the parties to the contract consent to the appropriation either expressly or impliedly.

An appropriation exactly means specifying the goods to which the contract is attached.

### Goods on Sale or Return

It will thus be seen that when goods are handed over to a prospective buyer on approval, i.e. on sale or return, the implied contract happens to be that the sale would be complete (1) at the moment of time when the prospective buyer signifies his approval or acceptance of the goods to the seller, or (2) when the said party does any act adopting the transaction, or (3) retains the goods for an unreasonable time without giving to the owner of the goods a notice of rejection.

### RESERVATION OF RIGHT OF DISPOSAL

There is, however, one case to be noted here, and that is as given in Section 25. Supposing that there is a contract for the sale of specific goods or of goods that are subsequently appropriated to the contract, but there is a term in the contract by which it is laid down that the seller has reserved the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding that the goods are delivered to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. The seller is *prima facie* deemed to have reserved a right of disposal also where the goods are shipped and the bill of lading lays down that the goods are deliverable to the order of the seller or his agent. The other point emphasized by this section is that where the condition of sale lays down that a bill of exchange should be accepted, the buyer is bound to return the bill of lading if he does not honour the bill of exchange. If he wrongfully retains the bill of lading, the property in the goods does not pass to the buyer. This is a new section added in the Indian law as the old Contract Act did not embrace any such provision. In this connection it may also be noted that there is no distinction drawn between a bill of lading or a carrier's or a wharfinger's receipt, or any other document of title to the goods. It is now possible under the new Act for the parties to provide by their agreement that the risk in the property may pass at some other time or on some condition and not simultaneously with the passing of the property because Section 26 begins with the words "unless otherwise agreed, etc."

### Price

We have already seen what is the exact meaning of the term price. It is defined as "money consideration for a sale of goods" [Sec. 2 (10)]. This price may be fixed by the contract or may

be left to be fixed in any manner specified in the contract. Failing that, the buyer is bound to pay the seller a **reasonable price**. What is a reasonable price is a question of fact depending upon the circumstances of a particular case. The course of dealing between the two parties may frequently determine the price. If the price is to be determined by valuation by a third party and the third party cannot or does not make such valuation, the agreement is void. If, however, the said third party is prevented from making the valuation by the fault of the seller or the buyer, the party not in fault can obtain damages against the party who is in fault (Section 10).

### DELIVERY

**Delivery** is defined by Section 2 as meaning the **voluntary transfer of possession from one person to another**. Of course before delivery can be made the goods ought to be in a **deliverable state**, i.e. ascertained. The delivery may be actual where there is actual handing over of the goods. It may be **constructive**, e.g. handing over of the key of the warehouse where the goods are kept and thereby giving possession of the goods to the buyer. If the goods happen to be in the possession of a third party, the delivery is made as soon as the third party agrees to hold the same on behalf of the buyer. The mere giving of a delivery order to the buyer will not constitute a delivery until the person holding the goods and against whom the delivery order is made, agrees to put the buyer into possession. According to mercantile practice, **constructive** or "**symbolic**" deliveries, or transfers, are also effected through the transfer of documents of title such as bills of lading, warehouse keeper's certificates, dock warrants, or by the giving of the key of the godown in order that the buyer may get the goods. If the delivery is to be made at a distant place, the usual loss caused through wear and tear on the journey and not through neglect on the part of the seller has to be borne by the buyer. In short, delivery of goods sold may be by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf (Sec. 33).

### Place and Time of Delivery

Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery (Sec. 35). In the absence of a contract the goods are implied to be taken delivery of **at the place** at which they are at the time of the sale, or in the case of goods agreed to be sold at a future date, they are implied to be taken delivery of at the place at which they are at the time of the agreement to sell, and, if they are not in existence at that time, at the place at which they are manufactured or produced. If the goods happen to be in the hands of a third party, there is no delivery by the seller to the buyer unless the third party acknowledges to the

buyer that he holds the goods on his behalf. The delivery should be demanded or tendered at a reasonable time and at a reasonable hour. What is a reasonable hour is a question of fact (Sec 36).

**Delivery of a part of the goods** in process of delivery of the whole has the same effect for the purpose of passing the property in such goods as a delivery of the whole, but the delivery of a part of the goods with an intention of severing it from the whole does not operate as a delivery of the remainder (Sec 34). Where, for example, the goods arrive by a steamer in full quantity and the captain begins to dispose of the goods and gives delivery of some part of the goods with the intention of delivering the whole, it is a good delivery. If, on the other hand A sells to B a stock of firewood to be paid for by B on delivery, and soon after the sale B applies for and obtains from A leave to take away some of the firewood, this has not the legal effect of delivery of the whole.

### Delivery of Wrong Quantity

When a delivery is given, the seller must deliver the **quantity agreed to be delivered** and if he delivers less than what he contracted to sell, the buyer may reject them. If the buyer accepts the goods so delivered, even in smaller quantities he must pay for the quantity taken delivery of. On the same principle if the seller delivers more than he contracted to sell the buyer may either reject the whole or accept the quantity he agreed to buy and reject the balance (Sec 37). If there is an agreement to deliver a fixed quantity, the buyer is not bound to accept delivery of that quantity by instalments. If, however, the agreement is to deliver against cash a certain quantity of goods in instalments, and if the buyer neglects or refuses to take delivery or pay for one or more instalments it is a question in each case depending on the terms of the contract and the circumstances whether this failure would amount to a repudiation of the whole contract or whether it is to be treated as a severable breach giving rise to a claim for compensation and not to a right to repudiate the contract (Sec 38).

### Delivery to Carrier or Wharfinger

When in pursuance of a contract to sell, a seller is authorized to send the goods to a buyer and the seller delivers the goods to a carrier, whether named by the buyer or not, to be transmitted to the buyer, it is *prima facie* deemed to be a delivery of the goods to the buyer. It is, however, expected that the seller should make a proper contract with the carrier or wharfinger which is reasonable having regard to the nature of the goods, otherwise if the goods are lost or damaged in the course of transit or when they are in the custody of a wharfinger, the buyer may decline to take delivery from the carrier or wharfinger as a delivery to himself or may hold the seller responsible for damages. In case the goods are to go by a route involving sea

transit when in the usual course they have to be insured, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if he fails to do so, the goods shall be deemed to be at the risk of the seller during such transit. This rule, of course, does not apply where goods are delivered to a carrier to be taken to a person who has a right to approve or return the goods, or on the footing of sale or return, because at the time they were sent there was no contract of sale. This section makes *prima facie* a wharfinger the agent of the buyer to take delivery in the case of a contract of sale (Sec 39). Even when the seller of goods agrees or undertakes to deliver them at the buyer's place on his own risk the ordinary risk of deterioration in the goods incidental to the course of transit still remains on the buyer (Sec 40).

The buyer has a right to examine the goods and must have a reasonable opportunity of doing so for the purpose of ascertaining whether they are in conformity with the contract. The seller, therefore, is bound to give this reasonable opportunity (Sec 41). When the buyer has intimated to the seller that he has accepted the goods, or does any act in relation to the goods which is inconsistent with the ownership of the seller he offers to resell them or keeps them for an unreasonable time with him without intimating to the seller that he has rejected them he is deemed to have accepted the goods (Sec 42). When the buyer rightfully rejects the goods, he is not bound to return them to the seller but all that he need do is to intimate to the seller that he refuse to accept them (Sec 43). This is on the principle that there is no reason why the burden of a situation caused by no fault of the buyer should be thrown on the buyer. Of course, when the seller offers delivery of the goods rightfully and the buyer does not take delivery within a reasonable time after such request, he is liable to the seller for the loss occasioned by his neglect or refusal to take delivery and he is also liable to pay a reasonable charge for the care and custody of the goods. This is, of course, subject to the seller repudiating the contract on the ground of failure to take delivery (Sec 44).

## CONDITIONS AND WARRANTIES

In this connection the law is embraced by our old Contract Act, has been materially altered and brought into line with the English law. Thus under Sec 12 a stipulation in a contract of sale may be either a condition or a warranty. A condition is defined as "a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated." Thus a condition is so essential that if it is broken it gives rise to the opposite party to treat the contract as broken and to move for its remedy. To take an apt illustration, a condition is akin to one of the main pillars supporting a building. The breaking of any of

these pillars results in the whole structure coming down. It may be added that the English Sale of Goods Act, from which we have mostly adapted our Indian Sale of Goods Act, does not define "condition", though the case law has fully laid down its definition along the lines of our Sale of Goods Act, as mentioned above. A condition may be (1) a "condition precedent", viz that which is to be fulfilled before the main purpose of the contract is to be performed. Thus if a person is appointed a trustee in bankruptcy on the condition that he should give security, the condition precedent here is the obligation imposed upon the trustee to give security before taking up the duties of his office, or (2) a "condition concurrent", which means that it is to be performed at the same time as the principal or main agreement. Thus in case a sale is made cash against delivery, the condition of payment is concurrent with the performance of the contract, or (3) a "condition subsequent", which means that the condition is that the fulfilment of the contract or the occurrence of an event, will discharge the parties from further liabilities on the contract, as for example in case of a charter party, which is an agreement for hiring of a ship, there is a clause, which is known as 'excepted risks', in which it is laid down that in the case of certain events occurring the shipowner will be discharged or released from the responsibility of performance of the contract. Here the event should occur subsequent to the entering into of the contract and the moment it occurs the party is released from the obligation to perform the contract.

A warranty, on the other hand, is defined by this section as "a stipulation collateral to the main purpose of the contract, the breach of which gives rise to an action for damages but not to a right to reject the goods and treat the contract as repudiated". Thus a warranty may be compared to one of the small support chains running parallel to the big main chain, the snapping of any of which does not necessarily break the big chain. Here, though the contract cannot be repudiated, the injured party may move for damages as compensation for the breach of warranty. This definition strictly follows the English Sale of Goods Act, 1893.

Whether a stipulation is a condition or warranty will, of course, depend in each case on the strength of the contract. One point is certain, that a stipulation as to the time of payment is deemed to be an essence of a contract of sale, and whether any other stipulation as to time is an essence of a contract or not depends on the terms of the contract. It may, however, be added that in the case of delivery, generally speaking, it is the tendency of the court to hold that in mercantile contracts the presumption is that time is the essence of the contract unless a contrary intention has been stressed in unmistakable language. It has been laid down that when merchants mention the time and dates in their contract, they are taken to mean and intend that that stipulation has to be strictly carried out.

The other important rule to be noted is that though a breach of condition gives rise in the case of a contract of sale to the right of the buyer to repudiate the contract, the buyer may, if he chooses, waive the condition or elect to treat the breach of the condition as a breach of warranty and ask for compensation. This is based on the general principle of the law of contract that a party may waive a stipulation which is not for his own benefit. Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or in the case of specific goods the property has passed to the buyer the breach of any condition by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term to that effect (Sec 13).

### Implied undertakings by seller

In the case of a contract of sale unless the circumstances show a different intention there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time the property is to pass. There are also implied warranties that (1) the buyer shall have and enjoy quiet possession of the goods and that (2) the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made (Sec 14).

## IMPLIED CONDITIONS

### Sale by description

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description (Sec 15). The fact that the buyer has seen or examined the goods does not prevent the sale being one by description if there is a latent defect in the goods. The place of origin of the goods may constitute a part of their description. Lord Abinger's description in the case of *Chatter v Hopkins*, (1838) 4 M & W 399 is very apt. He lays down that if a man offers to buy peas of another and the other sends him beans he does not fulfil the contract and this action can be treated as a non performance. Thus, according to the illustration in the old Contract Act, if A at Calcutta sells B 'Waste Silk' then on its way from Murshidabad to Calcutta there is an implied warranty that the silk shall be such as is known in the market under the denomination of 'Waste Silk'.



### Implied Conditions as to Quality or Fitness

Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he is the manufacturer, or producer or not, there is an implied condition that the goods shall be reasonably fit for such purpose. Of course in the case of a sale of an article under its patent or trade name, it does not import this implied condition as to fitness (Sec. 16). Supposing that A who has a boat of 100 tons calibre goes to B, who is a dealer in canvas, and asks for canvas in order to make a sail for this boat. If B supplies the canvas on being clearly told the specific purpose for which it is required, the sale carries an implied warranty that the canvas shall be fit for the purpose of being used in making a sail for a boat of 100 tons. Here the buyer has relied on the seller's skill. If, on the other hand, he selects the canvas without disclosing the purpose for which it is required, he does so on his own responsibility. In this case the rule of *caveat emptor* which means "buyer beware", does not apply. This rule under the Common Law of England lays down that in the case of a buyer who does not rely on the seller's skill, but who selects the goods himself, it is his own duty to see that the article he purchases is suitable for the purpose for which he wants it. In that case in the absence of any inquiry from the buyer, the seller is not bound to disclose the fact that it is not suitable for the buyer's purpose and the buyer buys the goods at his own risk. If A purchases a picture thinking that it is by a great artist, but without the seller making any such representation, he buys it at his own risk.

### Sale by Sample

In the case of a sale by sample, i.e. where there is an agreement, express or implied, that the goods are to be according to sample, there are the following implied conditions. That—

- (1) the bulk shall correspond with the sample in quality ;
- (2) the buyer shall have a reasonable opportunity of comparing the bulk with the sample ; and
- (3) the goods shall be free from any defects, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (Sec. 17).

Here if the defect be so hidden that it cannot be found out on reasonable examination, and the defect is of a nature that renders the goods unmerchantable, the third warranty on a sale by sample would be broken, e.g. a manufacturer offered to sell a certain kind of shirting according to sample. This shirting was sized with china clay to a very large extent which was not apparent on a reasonable examination of the sample. The buyer ordered the goods on the

footing of the sample and afterwards discovered the defect which rendered them unmerchantable; it was held that this amounted to a breach of warranty on the part of the seller. According to Lord Macnaghten, "the office of the sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country." (*Drummond v. Van Ingen*, (1887) 12 App. Cas. 297.)

### F.O.B. CONTRACTS

With reference to contracts for the sale of goods which are to be shipped from a foreign port, various conditions are attached by the custom and practice of merchants. The most usual are what are known as F.O.B. Contracts. The letters stand for "Free on board" and according to Halsbury (Vol. 25, p. 189), when the goods are shipped by the seller on these terms, "the risk *prima facie* attaches to the buyer on the shipment, whether the goods are at the time specific or unascertained". (*Stock v. Inglis*, (1884) 12 Q.B.D. 564, AFFIRMED IN 10 Ap. Cas. 263.) In this case Brett, M. R., expressed himself as follows:—

'Now if the goods dealt with by the contract were specific goods, it is not denied but that the words 'free on board', according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage." Proceeding further his Lordship lays down that "in case of these specific goods they are at the purchaser's risk even though the payment is not to be made on delivery on board, but at some other time and although the bill of lading is sent forward with documents attached with the condition that the goods are not to be delivered until the purchaser has either accepted the bills or paid cash."

With reference to unascertained goods, while laying down that the same rule applies he says:—

"Is there any mercantile or legal reason why a person should not agree to sell so much out of a bulk cargo on board or ex such

a ship, upon the terms that if the cargo be lost, the loss shall fall upon the purchaser, and not upon the seller? I can see no reason why he should not; and if such a contract can be made, and in a contract to buy and sell a certain quantity ex-ship, or ex-bulk, there is put in the terms 'free on board', one must, with regard to that contract, give some meaning to those words 'free on board'. What meaning can be given to them with regard to the unseparated part of the goods which is the subject-matter of the contract, but the same meaning as is given to those words with regard to goods attributed to the contract? What is there unreasonable or contrary to business or law in those words 'free on board', meaning in such a contract "I sell you twenty tons out of fifty upon the term that you shall pay such a price for those twenty, I paying the cost of the shipment, that is, 'free on board', and you bearing the risk whether they are lost or not?" It does not seem to me that there is anything inconsistent with business or law that parties should make such a contract with regard to a portion of a cargo than that they should make it with regard to a whole cargo or with regard to a specific part of a cargo and therefore the only question which remains is whether this is such a contract."

### "C.I.F." OR "C.F.I." CONTRACTS

The other forms of contracts of sale are "C.I.F." or "C.F.I." Contracts. Here the seller agrees to ship the goods at the port of shipment, procure the contract of affreightment under which the goods would be delivered at the destination, arrange for insurance and to tender these documents to the buyer in order to enable him to obtain delivery of the goods, if they arrive, or recover for their loss if they are lost. Against such a tender of the documents the buyer must be ready and willing to pay the price. (*Biddell Bros. v. F. Clemens Herst Co.*, (1911) 1 K.B. 214 at p. 220). According to Halsbury, Vol. 25, p. 211, "where the price is to include the freight and the insurance or as it is said, on "C.F.I." or "C.I.F." terms, the seller, as between himself and the buyer, is chargeable with the amount of the freight and the insurance charges, and the buyer, if he has been paid either of these charges, may take credit therefor."

In a Bombay case (*Steel Bros. & Co. v. Dayal Khutav & Co.*, 25 Bom. L.R. 1063), Mulla, J., at p. 1069 laid down the incidents of this form of contract as follows :—

"A 'C.I.F.' contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents. The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail, the seller must transmit the documents by mail. The contract is performed in fact, and the date of its performance is the date, when the documents would

come forward, the seller making every reasonable effort to forward them. In case of non delivery the contract is broken at the time when the documents ought to have been tendered and not when the goods arrive and damages must be estimated accordingly. The buyer is bound to pay on tender of shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting goods. The goods comprised in a C II contract must also be covered by an effective policy of insurance, an open cover taken out by the seller protecting all goods shipped by him is not sufficient. The policy must be tendered even if the goods arrive safely.

In one case however (*Mohanlal Kanimath v. Kishan Premji* Co 30 Bom LR 415) where the contract was described as C II but there were various terms and conditions in the contract which conflicted with all the basic principles as described above of a C II contract the court refused to treat it as a normal C II contract. Here it was provided (1) that the property in the goods was to be deemed to have passed to the purchaser as soon as they were delivered to the shipping company but the seller was to have a lien on the goods for his dues (2) payment was to be made against the bill of lading or delivery order (3) the purchasers were to undertake to clear the goods from the docks and that they should have no objection if the vendors elect to clear the goods (4) payment was to be made seven days after the arrival of the steamer. These clauses were inconsistent with the normal requirements and regulations applying to C II contracts. From this decision it is clear that if merchants and businessmen desire that the contract should be treated on a purely C II basis they should not encumber it with inconsistent clauses and conditions such as the above.

### TRANSFER OF TITLE

\* The usual and ordinary rule is that the transfer of title to the goods can only be made either by the owner or by one who had the authority of the owner. Thus it is laid down that where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than what the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. There is however, one exception to this rule which applies to the case of a mercantile agent. Here, if a mercantile agent happens to be in possession of the goods or of documents of title to the goods, which possession he has obtained with the consent of the owner then even if he were to sell the goods without the consent of the owner when acting under the ordinary course of business of a mercantile agent, he shall give a good title. Of course, it is necessary here that the buyer acts in good faith and has not at the

time of the contract of sale notice that he had no authority to sell (Sec. 27). A mercantile agent as defined by the Act means "a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods" (Sec. 2). This section follows the rule laid down in the English Factors Act, 1899, in almost the same language. Here it should be noted that even though the mercantile agent had not the consent of the owner to sell, his possession was through the consent of the owner.

The other case is where one of the joint owners of the goods has the sole possession of them by permission of the co-owners and an outside third party buys the goods from such a co-owner in good faith and without notice at the time of sale that the seller has no authority to sell (Sec. 28). The illustration given in the Contract Act makes this point clear. Where three joint Hindu brothers, A, B and C owned certain cattle, and when two of them left the cattle in the possession of A, and A sold one of the cattle to D who purchased it *bona fide*, the ownership in that animal passed to D.

The next point is the old rule under the Contract Act, which is reiterated in Section 29 of this Act: "When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents." The exception further states that in this case the original seller is entitled to compensation from the original purchaser. This means that if the seller has obtained goods by any wrongful means, such as misrepresentation not amounting to cheating, and then sells it to an innocent outsider, the outsider buying *bona fide* would get a good title, but the original misrepresented owner of the goods would be entitled to compensation for the loss from the person who obtains such goods under misrepresentation; e.g. A by a representation not amounting to cheating, induced B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract; the property in the horse is transferred to C and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract. If, on the other hand, the representation amounts to cheating, or criminal intimidation, or forgery, the third party though innocent and *bona fide*, does not get any title; e.g., A compels B by wrongful intimidation, or induces him by cheating, or forgery, to sell him a horse and before B rescinds the contract A sells the horse to C. The property in the horse is not transferred to C.

To sum up, besides the owner of the goods the following can sell and give a good title:—

- (a) A mercantile agent in possession of goods or documents of title with the consent of the owner ;
- (b) Any one of the joint owners who has sole possession with the consent of the other owners ; and
- (c) Any person who has obtained possession under a contract voidable at the option of the other party, unless obtaining of such a possession amounted to an effence.

Provided, of course, that in all these cases the buyer buys them in good faith.

### MARKET OVERT

It may be added here that in English law a fourth exception is provided for, viz. where the goods are bought on the market overt,<sup>a</sup> unless the thief, in case they are stolen goods, is prosecuted to conviction, the innocent buyer on the market overt gets a good title.

A market overt is the place where goods are usually exposed for sale. In various country sides markets are held on appointed days, whereas in large towns or cities the shops on main streets are markets overt after sunrise and before sunset. It has also been held in England that ground floors of the shops and not upper floors would be markets overt.

In India no rule as to market overt prevails, in fact markets overt were never recognized here. In other words, in the eye of the Law there are no markets overt in India. Even in England the rule of market overt has lost much of its importance.

### Possession after Sale

If a seller after having sold goods, continues in possession of the goods or documents of title to them, and delivers or transfers these goods or documents of title under any pledge or disposition to any person receiving them in good faith and without notice of the previous sale, the effect in law as far as the innocent buyer or pledgee is concerned is as if the delivery or transfer were expressly authorized by the owner of the goods. On the same footing, when a buyer obtains possession of goods with the consent of the seller and sells and delivers or transfers them to some innocent person either under a sale, pledge or other disposition, the person who receives them in good faith and, without notice of any lien or any other right on such goods of the original seller, has a good title.

### RIGHTS OF UNPAID SELLER

The seller of goods is deemed to be an unpaid seller when (1) the whole of the price has not been paid or tendered, or (2) a bill of exchange or other negotiable instrument has been received as conditional payment and has been dishonoured (Sec. 45).

An unpaid seller has the following three rights, notwithstanding

the fact of the property in the goods having passed to the buyer (1) Lien, (2) Stoppage in transit (*in transitu*), and (3) Resale.

### LIEN

An unpaid seller has a lien on goods sold if he is in possession of them by which he can refuse to part with them until payment or tender of the price in cases where—

- (1) the goods have been sold without any stipulation as to credit,
- (2) the goods have been sold on credit, but the term of credit has expired or
- (3) the buyer becomes insolvent

This lien will continue notwithstanding the fact that the unpaid seller is in possession of the goods as agent or bailee for the buyer. According to the old English Common Law rule, this is no longer enforced. The unpaid seller's lien terminates the moment he agrees to hold the goods as the buyer's agent or bailee, but it revives as soon as he becomes insolvent if the goods happen to be in his possession at the time. This new rule which was introduced in the English Sale of Goods Act 1907, and has been adopted by us in India, goes further and gives this lien to the unpaid seller who has made a part delivery, under which right he can exercise his lien on the remainder of the goods in possession, provided of course, it can be shown that the part delivery has not been made under such circumstances as to show an agreement to waive the lien (Sec 48).

**The lien is lost if**

- (1) the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods,
- (2) the possession of the goods is obtained lawfully by the buyer or his agent or
- (3) a seller waives his lien

This lien is not lost even where a seller has obtained a decree for the price of the goods (Sec 49).

### STOPPAGE IN TRANSIT

The next right of the unpaid seller is to stop the goods in transit. When the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price (Sec 50). These three conditions have to be fulfilled

- (1) the seller is unpaid who has parted possession,
- (2) the buyer has become insolvent,
- (3) the goods are still in transit, and
- (4) the seller has reserved to himself the right of disposal

The goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer until the buyer or his agent takes delivery of them from such carrier or other bailee. The important question here is, from what moment of time the buyer or his agent obtained delivery of the goods from the carrier, or from what moment of time the carrier agreed to hold the goods as the agent of the buyer instead of the agent of the seller. In other words, if the buyer or his agent obtains delivery of the goods before their arrival at the destination, the transit is at an end. If, however, the goods are rejected by the buyer and the carrier or other bailee continues in possession, the transit is not deemed to be at an end even though the goods have arrived at their destination. If the goods were placed on a ship which was chartered by the buyer, it would depend on the circumstances whether they are in the possession of the master as a carrier only or as an agent of the buyer. If the buyer demands delivery of the goods lawfully and the carrier wrongfully refuses to deliver them the transit has ended, and if part delivery of the goods has been given, the seller can still stop the balance unless it can be shown that this part delivery was given under such circumstances as to show agreement to give up possession of the whole of the goods (Sec 51).

The transit continues so long as the goods are in the possession of the carrier, or are lying at any place in the course of transmission to the buyer, but have not yet come into the possession of the buyer, or any other person authorized by the buyer to take possession on his behalf. In short, the transit continues as long as the carrier holds the goods as a carrier, and not as the agent of the buyer. If, however, the conveyance in which the seller sent the goods belongs to the buyer and the seller hands over the goods to the person in charge of the conveyance on request of the buyer, the goods pass into the possession of the buyer (*Chotman v. I Y R Co*, LR 2 Ch 332). Where, after the arrival of the goods at the appointed destination, the carrier or other bailee agrees to hold the goods on behalf of the buyer or his agent, the transit is at an end, even though the buyer may have employed the same carrier to take the goods to a different destination indicated by the buyer. The simple fact that the buyer appointed a particular carrier to bring the goods from the seller to him will not make that carrier the buyer's agent nor will it deprive the seller of his right of stoppage in transit. Again, if the buyer or his agent obtains delivery of the goods before their arrival at the appointed destination the transit ends. The seller, however, may annex terms to such delivery. He may also preserve his right of stoppage by making the goods deliverable to his order or assigns in the bill of lading. If, however, the carrier or the bailee wrongly refuses to deliver the goods to the buyer or his agent the transit is considered to be at an end. But if the buyer rejects the goods and refuses



to take delivery of them the transit is not at an end, and until he takes possession, the right of stoppage continues.

With regard to the goods delivered by the seller on the buyer's ship the transit continues if the delivery is given to the buyer *only in his capacity as a carrier* and this will be indicated by the fact that the bills of lading are made out in the name of the seller or his assigns. If, however, the goods are delivered to a ship chartered by the buyer then if the terms of the charter party clearly indicate that the buyer is a temporary owner of the ship under a demise thereof, the delivery of the goods on board the ship, will be a delivery to the buyer's agent, unless the seller has reserved the right of disposal; but if the terms of the charter party do not make the charterer a temporary owner, the goods are in transit. If the goods are delivered in part to the buyer, the remainder of the goods may be stopped in transit, unless the part delivery is made under circumstances that clearly indicate an agreement to give possession of the whole of the goods.

In one case the assignee of a bankrupt buyer went on board a vessel on which the goods were in transit to the buyer and touching the goods informed the captain that he had come to take possession of the goods, to which the captain did not agree. It was held that this did not come within the definition of "possession by the buyer or his agent" and therefore the right of stoppage in transit did not end. (*Whitehead v Anderson*, (1842) 9 M and W. S. 18)

In another case (*Dixon v Baldwin*, 7 R.R. 681), Lord Ellenborough states that "the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary." This circumstance was considered by the learned Judge as sufficient to mark the end of the transit.

**To sum up, the position is this.** In case the goods are handed by the vendor to the carrier as his agent or bailee, the transit continues as long as such agent holds the goods on behalf of the vendor; but if the carrier holds as a carrier pure and simple, the vendor can exercise his right of stoppage until the goods are handed to the buyer or the buyer's agent, or until the carrier agrees to hold them as the buyer's agent. In the words of Lord Esher (*Bethell v. Clark*, 20 Q.B.D.), "When the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage exists, but if the goods are not in the hands of the carrier by reason either of the terms of the contract, or of the directions of the purchaser to the vendor, but are in transit afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone."

**The transit, therefore, ends when**

- (1) the buyer or his agent has actually taken physical or constructive possession, or
- (2) when at the instance of the buyer they are ordered to a new destination after the original destination is reached. .

### **Modes of Stoppage**

The unpaid seller may exercise his right of stoppage in transit, either by

- (1) taking actual possession of the goods, or
- (2) giving notice of his claim to the carrier or other bailee in whose possession the goods are (Sec 52).

Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer. It is the duty of the carrier or other bailee who happens to be in possession of the goods to re-deliver them to the seller or according to his directions. It is not the duty of the seller to prove to the carrier that the stoppage is justified by events because in law the unpaid seller stops the goods at his own peril. If the carrier, in spite of having received this notice in time, refuses to re-deliver the goods to the seller, he is guilty of a conversion of the goods.

### **Transfer by Buyer and Seller**

✓ It may happen that the buyer, before the goods are stopped in transit, and anticipating receipt of them, has resold the goods. The unpaid seller is not here affected as far as his right of lien or stoppage in transit is concerned if he has not assented to this sale, unless he has issued a document of title to the goods to the buyer and the buyer has transferred the document to a person who takes it in good faith and for consideration. In this case, if the transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, but if the said transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee. However, in this last case, if the pledgee has some other goods or securities of the buyer in his hands and available against the buyer, the unpaid seller may require the pledgee to be satisfied out of these other goods and securities in the first instance (Sec 53). In other words, what is required here is that the unpaid seller can insist that the pledgee shall marshal the securities and exhaust them towards satisfying the claim before proceeding against the goods of the unpaid seller.

### **RESALE**

The third remedy of the unpaid seller is resale. Where the goods are of a perishable nature, they may be resold immediately. In the

case of resale, the unpaid seller who exercises his right of lien or stoppage in transit, should give notice to the buyer of his intention to resell, and if the buyer does not within a reasonable time pay or tender the price, the unpaid seller can resell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of the contract. If the resale results in a profit, the buyer is not entitled to it. If the unpaid seller sells without notice, he shall not be entitled to recover damages from the buyer. The buyer who buys from the unpaid seller of this resale gets a good title against the original buyer notwithstanding that no notice of resale was given to the original buyer (Sec. 54).

We have seen that ordinarily on a breach of contract for the sale of goods, the damages allowed to the seller are based on the difference between the contract price and the market price. The seller may, however, as is generally done in the case of indents, reserve to himself a special power of sale on default of the buyer, in which case he can sue for the difference between the contract price and the actual price realised at such a sale. Here the clause in the contract may provide that the seller can resell even without appropriation and such a clause would be valid and binding. (*Anguilla & Co. v. Sassoon & Co.*, 39 Cal. 581 ; *Moll Schutte & Co. v. Lachmichand*, 25 Cal. 505.)

### Special Resale Clause

It may be added here that it is the frequent practice among merchants in India to insert a special clause in the contract or indent, by which the seller is empowered to resell the goods on failure of the buyer to take delivery of the goods within the time specified and to recover the loss on such resale with interest from the buyer. In such cases the seller is entitled to resell even if the property in the goods has not passed to the buyer. The advantage here is that the actual loss on resale is recoverable, whereas in cases of ordinary contract the breach entitles the seller to recover only the difference between the contract and the market price and that too as on the date of the breach.

### SUITS FOR PRICE OR DAMAGES

We have already seen above that certain conditions reserved in indent enable parties to file a suit for the price or the recovery of damages on the footing of the price at which the goods were sold. Sec. 55 now provides that the seller may sue the buyer for the price of goods, provided

- (1) the property in the goods has passed to the buyer, and
- (2) the buyer refuses to pay for the goods according to the terms of the contract.

In cases where the sale price is payable on a day fixed by the contract irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may also sue him for the

price, although the property has not passed and although the goods have not been appropriated to the contract (Sec. 55). There was no corresponding section in the old Contract Act. It may further be noted that where the price is thus due and payable it becomes an ordinary debt, and where the price is payable unconditionally on a fixed date, the buyer must pay it on that day irrespective of the property passing to him and irrespective of delivery. In other words, where the property has passed, the seller has the option either to sue for the price under Sec. 55, or to sue for damages for non-acceptance under Sec. 44, which lays down that "when the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods; provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract." Here in the case of damages, of course, the measure will be the difference between the contract price and the market price on the day of the breach. A fall or rise in the market after the breach cannot affect the measure of damages.

On a similar principle, where the seller refuses to deliver the goods to the buyer, the buyer has a right to sue for damages for non-delivery (Sec. 57). That is the usual right of a buyer in the case of all mercantile transactions, unless the agreement is as under Sec. 58 for delivering specific or ascertained goods and the court in its discretion thinks fit to direct that the contract shall be specifically performed. Of course, as far as pecuniary compensation can be fixed to settle the matter, the court will not order specific performance. In connection with these damages, it is further laid down that where either party to a contract of sale repudiates the contract before the date of the delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach (Sec. 60). This rule lays down that it is at the option of the injured party either to move immediately for damages on the footing of the breach, or to wait for the day of performance and then sue the other party for all the consequences of non-performance. The latter course will, of course, mean that he keeps the contract alive for the benefit of the other party as well as his own, and if the market moves in favour of the opposite party the opposite party can take free advantage of it. In cases of breaches of contract in the absence of contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price. This interest may be either allowed to the seller or to the buyer. To the seller it will be allowed in a suit filed by him for the amount of the price from the date of the tender of the goods or from the date on which the price was payable. To a buyer

it will be allowed in a suit by him for the refund of the price in the case of a breach of contract on the part of the seller from the date on which the payment was made (Sec. 61).

### Sale by Auction

In the case of a sale by auction, the following rules shall apply according to Sec. 64 :—

- (1) Where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.
- (2) The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and until such announcement is made, any bidder may retract his bid.
- (3) A right to bid may be reserved expressly by or on behalf of the seller and where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction.
- (4) Where the sale is not notified to be subject to a right of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer.
- (5) The sale may be notified to be subject to a reserved or upset price.
- (6) If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

## CHAPTER VII

### AGENCY

#### **An Agent—who can be appointed**

An agent is defined as a person employed to do any act for another or to represent another in dealing with third persons. The person for whom such an act is done is called the principal (Sec. 182). Thus it will be noticed that somebody must be employed for the purpose of doing a particular thing on behalf of the principal, and thus all the actions of persons so employed, while acting in the course of that employment and under the express or implied authority of the principal, would be binding on the principal. It must be remembered that it is not mere employment that creates an agency, but **employment for the purpose of putting the principal into legal relations with others.** The person who employs an agent must have himself the legal capacity to do an act for which he employs the agent, though it is not necessary that an agent should be similarly capacitated. Section 183 clearly states that any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent, whereas with regard to the agent himself Section 194 clearly indicates that as between the principal and the third person any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal. In other words, if a person employs an agent who is an infant, the acts of the infant agent would bind the principal as far as they are done in the regular course of his agency, but if that minor agent violates any instruction of the principal, so far as the principal is concerned, he cannot sue his minor agent.

It is again not necessary that the agent appointed should get any consideration for his service (Sec. 185). The only point of difference between a gratuitous agent and a paid agent is that a gratuitous agent is not bound to do any work entrusted to him by his principal, but if he enters upon the work at all, he must do it properly and to the satisfaction of his principal. Thus a servant may be his master's agent if authorized by his master to do any particular act, but simply because he happens to be a servant he does not become an agent for that reason alone. The authority of the agent may be either express or implied (Sec. 186). An authority is said to be express when it is given by words spoken or written, whereas an authority is said to be implied when it is to be inferred from the conduct of the principal or the circumstances of the case; e.g. if a person gives another an authority to act on his behalf by a power of attorney, or

by a letter, or by stating that order in so many words, the authority is said to be express. If, on the other hand, A's servant was in the habit of going and buying goods on credit in A's name, and when the bills were presented by the tradesman to A, A was in the habit of paying them, that act would be construed as an authority given by implication, and if, therefore, after the servant's dismissal, the servant buys goods on his master's credit and disappears, the master, not having informed the tradesman of this dismissal in time, will be responsible (Sec. 187).

More than one person may be employed to act as agent either jointly or severally. If there is nothing to show as to how this authority is to be exercised, it is presumed to be joint, except in the case of public affairs where a large number is appointed, when the majority can act.

### Creation of Agency

There is no particular form of agreement or contract or document necessary to create an agency. In fact, in actual mercantile practice, many agencies are created orally or through implication, such as where a person orders his broker to buy goods for him or to secure for him a particular form of insurance policy, there is an agency created by an oral arrangement, the details of which are implied by the custom and practice attaching to such transactions. It is usual, however, where important officers and servants are given authority to act on behalf of their masters or principals in order to bind them in connection with various transactions, to give them a power of attorney in the form of a written document authorizing them to act in such capacity. In such cases, care should be taken to mention specifically all the terms of the agency concerned, and as far as possible, nothing should be left to implication. Agencies created to transfer or assign immovable properties, however, should be in writing and registered in India, whereas in English law, they should be made by a deed. In other words, an agent appointed to enter into a contract under a deed should have his authority in writing under a similar document except where the principal orders an agent in his presence to enter into a contract on his behalf, that fact was not in England permitted to be taken as a defence because the authority was not under seal, whereas the document which he signed was under seal. (*Ball v. Dunsterville*, (1791) 4 T.R. 313.) This is known as express appointment, i.e. an appointment by an actual agreement. These agency relations may be established by:—

- (1) express appointment by the principal, as described above,
- (2) agency by implication of Law,
- (3) agency of necessity,
- (4) agency by estoppel, and
- (5) agency by ratification.

*Agency by Implication.*—In this case the agency is created through implication or conduct. An auctioneer appointed to sell by public auction is to a certain extent an agent by implication; or a person left in charge of a shop by the owner may be construed by the public as an agent authorized to sell the goods in the shop and even if the person was not so authorized but did sell, the buyer will have a good case on the ground that the person was an agent by implication.

*Agency of Necessity.*—With reference to the creation of an agency, a situation frequently arises where a person is entrusted, under an emergency, with property belonging to another and something has to be done for its preservation during the interval before communication with the legitimate owner. The person so entrusted with this property is called in law an "agent of necessity" and gets an implied authority to do what is necessary to save the property. We have also seen in the case of a wife who through no fault of hers has been forced to live apart from her husband, that she can pledge her husband's credit for all necessities of life according to the position of the husband. Here also the pledging of credit is created by **Common Law** through an agency of necessity having been created. Yet another case is where a ship is in distress and the captain cannot communicate with the ship owner or cargo owner, he is empowered to pledge the ship owner's or cargo owner's credit and borrow money with a view to meet the expenses of repairing the ship or of preserving the cargo while on the voyage.

*Agency by Estoppel.*—If a person holds himself out either by words or by contract with some other person as his agent to make contracts on his behalf, he will be bound by contracts made by that party on his behalf though he may not be in fact an agent. This is because the rule of estoppel applies and he is stopped or prevented from denying the truth of the fact which he at one time asserted and on the belief of which assertion a third party has altered his position. A person who is not an agent may be so held out to be, or a person who is an agent may be held out as authorized to do much more than his authority warrants, or a person who has ceased to be an agent may be held out as still continuing as one.

*Agency by Ratification.*—Ratification is defined by the Contract Act, Section 196, as "Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority." In Common Law this is a special type of agency known as "agency by ratification".

The doctrine of ratification is a famous doctrine of English law which has been the subject of interpretation by many eminent English judges. According to Tindal, C. J., in *Wilson v. Tumman*, (1843) 6 M. and G. 236: "That an act done for another, by a person not assuming to act for himself but for such other person though without



any precedent authority whatever, becomes the act of the principal, it subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be founded on a tort or on a contract, to the same effect as by, and with all consequences which follow from, the same act done by his previous authority." The person who has the right to ratify is the person in whose name or on whose behalf the contract was entered into.

Ratification may be of one act or of a series of acts. Every act may be ratified if it be not void in its inception, as long as it is capable of being done by the principal himself. A voidable act may be the principal element in connection with ratification, but the person must have acted "on behalf of another" and not on his own behalf, and if it turns out that the person on whose behalf he presumed to act had given him no authority whatever, or that such a person's authority was exceeded, then such an act may be ratified by the assumed principal in the first case, and by the principal whose authority was exceeded in the second. The ratification when made would have a retrospective effect and would relate back from the date when the act was committed. There are, however, acts which cannot be ratified, as, for example, a forged signature. Also in the case of a joint-stock company when certain acts are done by supposed agents, these acts can only be ratified by the company if they come within the objects clause of the memorandum of association, otherwise they cannot be ratified by the company which has no power to do the act itself.

Another condition to ratification is that the principal claiming the ratification must have been in existence on the day the act sought to be ratified was done; e.g. in the case of a company after incorporation, i.e. after the company was brought into existence; the act should also be ratified within a reasonable time.

The ratification may be express or implied from the conduct of the parties, as for example, by acquiescence (Sec 197). A person whose knowledge of the fact of the case is materially defective cannot make a valid ratification (Sec 198). The ratification must be of the whole act and cannot be of a part, and therefore, a person who ratifies an unauthorized act done on his behalf, ratifies the whole of the transaction of which such act forms a part (Sec 199). If an act is done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, it cannot by ratification be made to have such effect (Sec 200). As for example (a) A, not being authorized thereto by B, demands on behalf of B the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver; (b) A holds a lease from B, terminable on three months' notice. C, unauthorized by B, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

We have seen that ratification must be made within a reasonable time. It may be that the time is fixed by the nature of the particular case ; e.g. the exercise of an option by an authorized agent should be ratified within the time in which the option was to be exercised. Besides this the ratification ought to be clear, i.e. a specific adoptive act of the person ratifying who should make it clear that he ratifies, or the ratification may be by acquiescence ; e.g. receipt of purchase money was in one case held to be sufficient evidence of the ratification of sale by an unauthorized agent. Where the contract is ratified, the unauthorized agent or the agent who has exceeded his authority, is relieved from general liability to his principal for exceeding his authority and may even recover his commission and expenses.

### Different classes of agents

An agent may be either (1) special, (2) general, or (3) universal.

(1) A **special agent** is one who is authorized to do a particular act on behalf of his principal, i.e. to go and buy a particular article or to sign a particular document for his principal.

(2) An agent is said to be **general** where he is authorized to do each and every act which may be necessary to enable him to carry out his agency ; e.g. the manager of a branch office would be a general agent to do all that is necessary to carry on the branch business.

(3) A **universal agent**, however, possesses unlimited authority and therefore can act for his principal on all lawful matters.)

It will thus be noticed that it is absolutely necessary while dealing with an agent to know the exact nature and scope of his authority, in order to ascertain whether the agent has the authority claimed by him ; otherwise the principal will not be liable on the agent's contracts entered into by him in excess of his authority. A signature *per pro* is considered a sufficient warning to all who are called upon to accept it, that the agent signs by virtue of a power which may be either limited, or very wide, and it is therefore the duty of the person accepting such a signature, as the signature of the principal, to ask for the production of the power of attorney with a view to satisfy himself as to whether the agent has the authority claimed by him. In the case of a married woman living with her husband, she is supposed to have an implied authority to incur debts on behalf of her husband with regard to household necessities, in the course of her management of the household, but the authority may be terminated by the husband either by giving the wife a special separate allowance, or by the wife leaving the protection of her husband of her own accord<sup>1</sup>.

Thus according to *Bowstead on Agency* :—

“Where a wife occupies the position of her husband's house-keeper, he is deemed to hold her out to the world as having the usual authority of a house-keeper, and is bound by all acts within the scope of such apparent authority unless the persons

dealing with her knew that her authority is expressly limited and that she is acting in excess thereof."

The same principle would apply to a Hindu, Parsi, or European wife, and it has been held in one case that a Hindu wife who lives separate from her husband, because the husband has married a second wife, has no implied authority to borrow money for her separate maintenance, as in Hindu Law second marriage does not justify separation. However, if a married woman contracts debts in connection with her separate estate, independently of her husband, she will not be considered to have acted as the agent of her husband, under any circumstances.

With regard to a **general agent**, Section 188 clearly lays down that an agent having authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having authority to carry on a business, has authority to do any lawful thing necessary for the purpose in the course of conducting such business.

### Mercantile agents

The special classes of mercantile agents one comes across are the following:—

✓(1) A **factor** is defined as an agent "employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation". (*Storey on Agency*, Sec. 33.)

∴(2) A **broker** is defined by the same authority to be "an agent employed to make bargains and contracts in matters of trade, commerce or navigation, between two parties for a compensation commonly called brokerage".

It may be added here that the difference between a **factor** and a **broker** is that in the case of a factor he has the possession of the goods whereas a broker has not. A factor generally sells goods in his own name, but a broker generally has not that authority. A factor receives payment and gives valid receipts, and having the possession of the goods he has an insurable interest in them. ✓ For the same reason, he has a lien on these goods for the charges that may be due to him. A factor makes advances on the goods in his possession. A broker, on the other hand, is only an agent for the purposes of sale or purchase, on behalf of his principal, and when he enters into a contract he enters the terms of his purchase or sale in his **memorandum book**. He then makes out a "**Bought Note**" and a "**Sold Note**"—which must be written in identical terms—signs and sends them to the buyer and seller respectively, which notes, if they agree, will constitute evidence of the agreement between the buyer and the seller. Should the bought and sold notes differ, the entry in the broker's book would constitute the contract. (*Southwell v. Bowditch*, (1876) 1 C.P.D. 374.) The broker, when authorized to sell or buy, has the implied authority to act on the usages of the

market concerned and bind his principal unless such usages are unreasonable or unlawful. (*Cropper v. Cook*, (1868) L.R. 3 C.P. 194.) A broker is not liable on the contracts he enters into as a broker even though the name of his principal is not disclosed in the contract note. (*Southwell v. Bowditch*, (1876) 1 C.P.D. 374.) A custom of the market may, however, make him liable. A further point to be noted in the case of a factor is that when a factor has made advances and his security is impaired by a fall of the market or any other cause he is invested with a power of sale after due notice to his principal, if the principal does not put his factor in funds to make up the deficit. (*Jafferibhai L. Chattoo v. Thomas D. Charlesworth*, 17 Bom. 520.)

### STOCK BROKERS

There are various types of brokers and one of the most important types one comes across in the mercantile world is the stock broker. The stock broker is generally a member of the local Stock Exchange. On all exchanges in India, the broker is employed by the client to buy or sell and carries out the bargain by approaching another broker member of the Stock Exchange. The rules of the Stock Exchange make it compulsory for selling as well as buying brokers to be prepared to give delivery of the stock bought or sold, on payment, according to their contracts. When a person engages a stock broker, or any broker who happens to be a member of a market or exchange like the Stock Exchange or Cotton Exchange, the principal who engages him will be presumed to have given him the authority to enter into this contract in compliance with the rules and regulations of his market, and thus all the reasonable customs and rules of the markets concerned which are binding on the broker are also binding upon his principal, whether the principal is aware of them or not. It is usual among brokers to put through transactions in connection with a particular share or stock on behalf of several clients in one transaction and then to split them in his own book, dividing them into as many separate transactions as there are clients for whom he entered into them. This custom has been recognized as binding on the principal by the custom of the Stock Exchange. (*Scott v. Godfrey*, (1902) 2 K.B. 726.)

(3) **Bankers** are agents of their customers to pay sums of money on their behalf as ordered by them, to purchase and sell securities, collect interest and dividend on them and act as custodians of their securities and valuables on behalf of their customers; they also collect cheques and bills of exchange on their customers' behalf and render numerous other services to their customers as agents.

(4) **An auctioneer** is defined by Storey as "a person authorized to sell goods or merchandise at a public auction or sale for a recompense." (*Storey on Agency*, Sec. 27.) He may be an agent for both

seller and buyer, and may or may not be entrusted with the possession of the goods or property to be sold, or of documents or title-deeds. Generally speaking, he is the agent for the seller, and therefore can do all such acts as may be necessary in order to auction the goods, and when the goods have been knocked down to the highest bidder, he becomes an agent for the buyer also. Thus when he makes an entry in his book, relating to a sale and signs it, it binds both the buyer and the seller. It must be noted, however, that an auctioneer's clerk has not that authority. (*Bell v. Balls*, (1897) 1 Ch. 663.) Besides this, an auctioneer is expected to sell for cash, otherwise he would have to make good the losses suffered through his having delivered goods on credit. He has an implied authority to receive money against the goods, but with regard to the sale of land he can receive the deposit only, unless expressly authorized to receive the full amount.

When an auction sale is advertised, it is not to be taken as an agreement to hold the sale, with the result that if the sale does not take place the auctioneer cannot be sued for damages by persons who effect the sale on the ground that their time was wasted or that they incurred expenses in coming to the sale. (*Harris v. Nickerson*, (1873) 8 Q.B. 286.)

**Dutch auction** is one in which the auctioneer himself offers the article at a price and then gradually reduces it until the buyer is found to accept the article at a price.

✓ (5) A **commission agent** is generally an agent who acts on behalf of a foreign principal and earns his commission for his labour. He differs from a broker in so far as the authority to establish the privity of contract between his employer and third persons is concerned. He only buys on behalf of his employer in his own name and receives a commission for his trouble.

It frequently happens that a commission agent, when he buys goods for a foreign principal, gives to the seller an acceptance price and is personally liable for the payment of the price. But in case the principal fails to pay the seller, and the agent has to make good the amount, he can sue his principal for indemnity but not as for goods sold and delivered. It has also been held that a commission agent for a foreign principal has no implied authority to pledge his principal's authority.

✓ (6) A '**del credere**' agent is one who in consideration of an extra commission, agrees to indemnify the principal against loss arising from the failure of a person with whom he contracts on behalf of his principal. In other words, the agent here gives an undertaking that nothing shall be lost by his principal through the failure of a third party. The *del credere* agency arrangement may be either express, or implied from the fact that the agent was charging an additional commission for the risk.

## COUNSEL, ATTORNEY AND PLEADER

Though these cannot be classed among mercantile agents they are always engaged by merchants to conduct their suits in connection with mercantile disputes. In the case of a **counsel** his authority for the trial, unless limited, relates to the trial and all matters incidental to it and to the conduct of the trial (*B N Sen v Chunilal & Co.*, 51 Cal 385.) An **attorney** has a similar authority and may compromise his client's suit unless his client has given express instruction to the contrary. A **pleader**, on the contrary, must obtain the client's special authority before entering into a compromise of the suit.

### Sub-agent

A sub-agent is defined by Section 191 as "a person employed by and acting under the control of the original agent in the business of agency." With regard to the appointment of sub-agents, Section 190 clearly states that an agent cannot lawfully employ another to perform acts which he has expressly, or impliedly, undertaken to perform personally unless, by the ordinary custom of trade, a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

This rule (Sec. 190) is based upon the maxim of Roman Law, *viz delegatus non potest delegare*, which lays down the general rule that an agent cannot delegate his powers to another in whole or in part without express authority from his principal (*De Buvache v. Alt.*, (1873) 1 L.R. 8 (H.D. 240).) This is on the supposition, that when a person is appointed an agent, the person appointing does so because he has confidence in the person so appointed, and thus where it is proved that this was so, no delegation is allowable, however general the nature of the duty, except in the case of urgent necessity. To this rule, of course, there are well recognized exceptions; e.g., where the custom of trade permits such delegation, or where the nature of the business is such that it cannot be carried on without the appointment of sub-agents, or where the principal acquiesces in the appointment of a sub-agent. Where, however, a sub-agent is properly appointed, the principal is, so far as regards the third person, represented by the sub-agent, and is bound by and responsible for his actions, as if he were an agent originally appointed by the principal. But, as far as the agent himself is concerned, he is responsible to the principal for the actions of the sub-agent, and the sub-agent in his turn is responsible for his actions to the agent, but not to the principal, except in cases of fraud or wilful wrong (Sec. 192).

Further, as a sub-agent is not personally in contractual relationship with the principal, he has to look to the agent for his remuneration.

If, however, an agent appoints a sub agent without having authority to do so, such agent would be responsible for the sub agent's actions both to the principal and to a third party. The principal himself, not being represented by the sub agent, is not responsible for the acts of such person nor is such a person responsible to the principal (Sec 193)

Our Contract Act makes a further distinction in Section 194 and states that where an agent holding an express or implied authority to name another person to act for the principal in the business of an agency, has nominated another person accordingly, such person is not a sub agent but an agent of the principal for such part of the business of the agency as is entrusted to him, e.g., A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub agent, but is A's agent for the conduct of the sale. Similarly, A authorizes B a merchant in Calcutta, to recover the money due to A from C, and B instructs his solicitor D to take legal proceedings against C for the recovery of the money, D is not a sub agent but is a solicitor for A. It is, however, further specified that, if in this case the agent names or selects the other person for his principal, he is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, and if he does that he would not be responsible to the principal for the action of the agent so selected.

### TERMINATION OF AGENT'S AUTHORITY

¶ An agent's authority terminates by (1) revocation by the principal, (2) renunciation by the agent, (3) completion of the business of the agency, (4) the death or insanity of the principal or the agent, or (5) the adjudication in insolvency of the principal (Sec 201)

To these five incidents which terminate the agency may be added the following -

- (6) Effluxion of time
- (7) Destruction of subject matter
- (8) Agreement of the parties

Termination under (1), (2) and (8) is known as termination by the **act of parties** whereas the rest is known as termination through the **operation of law**

#### (1) & (2) REVOCATION BY THE PRINCIPAL OR AGENT

With regard to the principal's right to terminate the authority, Section 202 lays down that "Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest" As, for example, A gives authority to B to sell A's land, and to pay himself out of the proceeds the debts due to him from A. A cannot revoke this authority, nor can

it be terminated by his insanity or death [illus. (a), Sec. 202]. This is called "**authority coupled with interest**". The other case where the agency is not revocable is when the same is given by deed or by an agreement for a valuable consideration with a view that the agent may secure a particular benefit.

In this connection it may be said that in the case of a factor though his authority can be revoked at any time, even though he may have made advances, still if the principal has authorized the agent to sell the goods and to pay himself out of the proceeds against his advances he falls under Sec. 202 and becomes an agent having a personal interest in the property and thus the principal in such cases cannot revoke his authority. There is, however, no objection to the authority of the agent being revoked or terminated by agreement between the principal and the agent or by either side giving notice to that effect. The principal may, save as provided for by Section 202, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal; e.g., an authority given to an auctioneer to sell the goods may be revoked at any time before the goods are knocked down to the highest bidder. But where the authority given to the agent has been partly exercised, it cannot be revoked so far as regards such acts and obligations as arise from acts already done in the agency; e.g. A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment (Secs. 203 and 204), but if the authority has been given for any period of time either expressly or by implication the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without specific cause (Sec. 205).

The termination of the agency takes effect from the time the agent is informed of it, and so far as third parties are concerned it only terminates after it becomes known to them (Sec. 208). Even after termination of agency by the death of the principal or the principal becoming of unsound mind the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Sec. 209).

### **(3) COMPLETION OF BUSINESS OF THE AGENCY**

This occurs when an agent who is employed to do a particular work completes it; e.g. a broker employed to procure a buyer for a particular house or motor car procures one and is accepted by his principal, that particular agency is terminated from the moment of the completion of that transaction.



**(4) BY DEATH OR INSANITY**

With regard to termination by death or lunacy of the principal, it may be stated that in **English law**, in the case of death or bankruptcy the authority is immediately terminated, and the representatives of the dead principal are not bound by contracts made by the agent after the principal's death unless they ratify them. In the case of lunacy, however, the agency is terminated as between the principal and agent, but as far as third parties are concerned, if they did not know of the lunacy at the time they dealt with the agent, they would not be affected by it.

In **India**, however, whether in cases of insanity or death the third parties must have had notice, otherwise as far as they are concerned, the agency is not terminated.

**(5) BY ADJUDICATION IN INSOLVENCY**

With regard to the bankruptcy of the principal, it may be added that an agent, who continues to act as such, knowing that his principal has committed an act of bankruptcy may be held personally liable if his principal be adjudicated a bankrupt within ~~three~~ <sup>twelve</sup> months of such act of bankruptcy. It may be added that ~~in case~~ <sup>in case</sup> of the termination of agency by bankruptcy of the principal in **England** it is not necessary that the third parties should have knowledge of such termination, whereas in **India**, the termination does not operate until the fact of death or lunacy is brought to the knowledge of third parties. Where the agency terminates by death, bankruptcy or insanity, it is said to be a **termination by the operation of law**. Finally, the termination of the authority of an agent puts an end to the authority of all subagents appointed by him (See 210).

**(6) EFFLUXION OF TIME**

If the period during which the agency was agreed to continue terminates, the agency naturally is determined, unless by an express or implied agreement of the parties it is further continued.

**(7) DESTRUCTION OF SUBJECT-MATTER**

If the subject-matter for which the agency contract was originally entered into, say an agency for a particular steamer or for the use of a particular theatre, is destroyed, the agency naturally comes to an end.

**(8) AGREEMENT OF PARTIES**

It is easy to understand that agreement between parties can terminate all agencies even before the effluxion of time.

## AGENT'S DUTIES

The duties of an agent to his principal may be briefly put down under the headings of (1) obedience, (2) skill and diligence, (3) rendering of accounts, (4) emergency, and (5) fidelity.

### OBEDIENCE

With regard to the first, an agent is bound to conduct the business of the agency according to the directions given to him by his principal, or in the absence of any such directions, according to the custom of trade which prevails at the place where the agent conducts such business; otherwise the agent would have to make good losses, if any, sustained by his principal; but if any profit is made that would belong to his principal (Sec. 211). This rule must be strictly followed and under no circumstances, even if he thinks it is for the benefit of the principal, can he act contrary to his principal's express instructions, because if he does so the benefit arising, as we have seen, will go to the principal but the loss will fall wholly on him. The agent is strictly bound to obey his principal as far as the principal's instructions are lawful. In the absence of instructions from the principal, he has to act according to the custom of trade prevailing as we have seen above.

If, for example, the agent has been instructed to keep the principal's money in a particular bank and the agent deposits it in some other bank, the agent will have to make good the loss in case the latter bank fails and the money is lost.

### SKILL AND DILIGENCE

With regard to the second part, the agent employed to do the work is expected to do it with **reasonable skill and diligence**, i.e. with such skill and diligence as a prudent man who claims to be possessed of such skill would exercise while acting with regard to his own affairs of a similar character. If an agent is particularly appointed on account of his special skill as an expert then he must show expert skill and act according to the standard which is expected of men in that particular profession, e.g. if a lawyer were to be appointed to conduct a suit he cannot say to his client, "I did not know the law on that particular point" and hold that out as an excuse. The only distinction that need be discussed here is between a gratuitous agent and a paid agent, which we have already dealt with. In the language of the Contract Act An agent is bound to conduct the business of his agency with as much skill as is generally possessed by persons engaged in a similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss

or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct." (Sec. 212). As, for example, A, an insurance broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B [Sec. 212, illus. (c)].

### ACCOUNTS

An agent is bound to render proper accounts to his principal on demand (Sec. 213). It is one of the important duties thrown on the agent that he must keep proper accounts and produce them with vouchers and receipts whenever the principal desires their production. Any delay on his part will make him liable to pay interest and other expenses. What is expected of the agent is not only to produce accounts but also to come and explain them personally if required. An agent who has not kept proper accounts is likely to have the presumption against him on all consistent and established facts.

It is an implied contract between a principal and his factor or agent that the latter will render accounts on demand from the former.

### EMERGENCY

It is a further duty of the agent to communicate with the principal in cases of emergency and as far as possible to ask for instructions in the matter (Sec. 214).

### FIDELITY

In this case the agent is bound to act honestly and to disclose to his principal all material facts known to him. If the agent, in the course of the agency, personally buys from or sells to his principal goods he is asked to sell or buy on account of his master, without obtaining the principal's consent, or without letting him know of the fact that he is himself the purchaser or seller of such goods, or without acquainting him with all the material facts which may have come to his knowledge on the subject, the principal may repudiate the transaction where it can be shown that any material fact has been knowingly concealed from the principal by the agent, or that the dealings of the agent have been disadvantageous to the principal; e.g. B an agent, employed by A to sell an estate, buys the estate for himself in the name of C. A on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him. This rule is based upon the principle that when an agent is asked to sell, he must try and obtain the best possible price for his principal, and therefore, if he himself becomes the buyer without disclosing the fact to the principal, or without

obtaining his consent, he cannot be said to have acted in good faith nor to have obtained the highest price for his principal because his interests in such circumstances would clash with those of the principal. Again, if an agent, without the knowledge of his principal, deals on his own account in the business of the agency, the principal is entitled to claim from the agent any benefit which the agent may have derived from the transaction. The agent who is guilty of such a lapse is entitled to nothing more than his lawful remuneration and all the profits made and advantages gained by him in such transactions beyond his legitimate remuneration must go to the principal (*Morrison v. Thompson*, (1874) L.R. 9, Q.B. 480). The agent here is acting in a fiduciary capacity so that he is bound to fully disclose his intention and must account for all secret profits made by him. The agent who has thus wrongly dealt on his own account is not entitled to any commission on such a transaction.

If the principal discovers that the agent has received payment by way of bribe he is entitled to (1) repudiate the contract made by the corrupt agent, (2) dismiss his agent without notice, (3) forfeit any commission in respect of the transaction which the agent may have earned, (4) recover any money he may have received by way of profit, with interest at 5 per cent per annum from the date of receipt of such payment to the last date of such payment, and (5) sue the third party for damages sustained through such bribery.

It may be added here that in England they have an act known as "Prevention of Corruption Act, 1906". The agent who corruptly accepts or attempts or agrees to obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or not doing any act with regard to his principal's affairs or business, is liable to imprisonment with hard labour not exceeding four months or to a fine not exceeding £50 or both imprisonment and fine. Thus corruption or separate commission, as it is called in mercantile parlance, is not only a criminal offence entitling the principal to recover from the offending third party and recover the bribe from the agent, but the agent is liable to be criminally punished. We have no such Act in India. The only condition in English law is that before the party can be sued, the consent of the Attorney General or the Solicitor General should be obtained.

### Rights of an Agent against his Principal

An agent has the right to retain, out of the sum received on account of his principal, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting the business of the agency and to repay the balance to the principal.

This will include the right to recover from the principal all moneys paid by the agent as such on behalf of the principal, either at the latter's request, or under the implied understanding arising

from the nature of the agency, or through the custom of the market where the agent is instructed to transact business on behalf of his principal. Thus it has been held that a person who employs a broker on the Stock Exchange, impliedly authorizes him to act according to the rules and usages of the Exchange as far as they are reasonable and legal.

Of course, if he has misconducted the business he has no right of remuneration in connection with that work which he has misconducted. Otherwise with regard to his lawful remuneration he has, subject to any agreement to the contrary, a right of retention against goods and other properties of the principal, whether movable or immovable, that happen to have come in his possession in the course of agency transactions until the money due to him for commission and other services as an agent has been paid.

### PRINCIPAL'S DUTIES

The principal, on the other hand, is bound to indemnify his agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. He is also responsible to make good the losses and liabilities that may have been incurred by the agent on behalf of the principal while acting in the exercise of his authority arising through the rules and customs of a particular trade or market in which the agent was authorized to deal, so long as the rule or custom was reasonable and the principal had notice of it.

The principal is also liable for any act done by the agent in good faith in case such act causes any injury to the rights of a third person and against all consequences of that act. Section 223 says:—

"Where one person employs another to do an act and the agent does the act in good faith the employer is liable to indemnify the agent against the consequences of this act though it causes an injury to the rights of third persons;" e.g. B at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses [Sec. 223, illus. (b)].

With regard to the above it must be noted that if the agent was employed to do a criminal act he has no right of indemnity against his principal for the consequences of such an act; e.g. A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

If any loss is caused to the agent through the principal's neglect or want of skill, the principal is in his turn bound to make compensation for such loss (Sec. 225).

## EFFECT OF AGENCY ON CONTRACT WITH THIRD PERSONS

Where a principal has given authority to his agent and the agent acts under that authority, all contracts entered into through that agent are binding on the principal and the obligations arising therefrom may be enforced against the principal as if he had himself entered into them (Sec. 226). This rule will apply even where the agent enters into a contract in furtherance of his own interest and contrary to the interest of his principal, as long as the third party while dealing with the agent acted in good faith. If the agent exceeds his authority and does more than he is authorized to do, the rule is that where that part which is within his authority, can be separated from that which is beyond his authority, so much only of what he did as was within his authority is binding between him and his principal. As far as the third party is concerned, the principal cannot escape liability if that act falls within the apparent scope of authority of the agent. If, however, the act done falls outside the apparent scope of the agent's authority the principal will not be bound by such act under any circumstances (Sec. 227). But if that which is within the scope of the authority of the agent cannot be separated from that which is beyond that scope, the principal is not bound to recognize the transaction; e.g. A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of Rs. 6,000. A may repudiate the whole transaction (Sec. 228).

It may, however, happen that by the usage of a particular market or trade the agent may be personally liable either to his own principal, or to a third party, where he has not disclosed his principal at the time of the contract.

Notice or information given to the agent in the regular course of the business transacted by him for the principal shall, as between the principal and third parties, be a notice to the principal; e.g. A who is employed by B to buy from C certain goods of which C is the apparent owner, buys them accordingly. In the course of the treaty for the sale A learns that the goods really belonged to D but B is ignorant of the fact. B is not entitled to set off a debt owing to him from C against the price of the goods (Sec. 229). This rule does not apply where the agent who has notice is himself a party to the commission of a fraud on the principal in connection with the transaction of which he had notice. The agent who is himself a party to the fraud is not supposed to communicate the fraud to the principal who is the defrauded party and, therefore, in such a case, a notice to the agent cannot be taken as a sufficient notice to his principal. [*Hormasji v. Manjiverbhai*, 12 B.I.C. 262.]

## AGENT PERSONALLY LIABLE ON CONTRACTS

As we have seen above, contracts properly entered into by an agent on behalf of the principal are binding on the principal personally,

and therefore, the principal himself can enforce the contract. The agent cannot personally enforce such contracts entered into by him on behalf of his principal, nor would he be personally liable on such contracts unless there is an agreement to that effect. There are, however, the following exceptions to this rule where it is presumed that a contract exists by which the agent would be personally bound—

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad,
- (2) where the agent does not disclose the name of his principal,
- (3) where the principal though disclosed, cannot be sued (Sec 230)

In all the above cases the ground on which the agent is presumed to be personally liable is that the credit was given by the third party to the agent in person.

With regard to the case of an agent acting for a foreign principal, it has been held in English courts that an agent for a foreign principal has **presumptively** no authority to pledge the credit of a foreign principal. The agent can, however, protect himself by clearly making the contract in the name of his principal and without recourse to himself.

### Foreign principal

With regard to a foreign principal it may be added that the right of the third party to sue the principal is not lost by the presumption contained in Section 230. If there is a writing in which a foreign principal is made a contracting party, the foreign principal would be personally liable.

### Undisclosed principal

In the case of contracts on behalf of an undisclosed principal, the credit would be taken to have been given to the agent by the third party who relied solely on the credit of the agent while dealing with him on behalf of the undisclosed principal. If, however, it can be shown that the third party knew the name of the undisclosed principal, and the principal was made personally liable, the presumption making the agent personally liable will be rebutted. Chief Justice Lord Tenterton lays down in *Thomson v. Devanport*, (1829) 9 B and C., p 86 that 'If a person sells goods (supposing at the time of the contract that he is dealing with a principal) but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal.' In short, the **general rule** is that where an agent deals with a third party without disclosing the fact that he is an agent and afterwards it is clear that he was only acting as an agent and not on his own account, the third party would have the option either to sue the agent or the principal. If, however,

the third party knew that the person acting was an agent, but the name of the principal was not disclosed, i.e. the principal was unnamed, the agent would not be personally liable except where the usage or custom of trade made him liable.

### Indian rule re : undisclosed principal

The Indian rule with regard to an undisclosed principal is clearly laid down in Section 231 as, "If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had against the agent if the agent had been principal." It is, however, open to the other contracting party to refuse to fulfil the contract if the principal discloses himself before the contract is completed. This can be done by the third party on the ground that he did not know that there was an undisclosed principal, because if he had known, he would not have entered into the contract. Thus the Indian law rule is even stronger than that of English law, because here the mere non-disclosure of the principal's name is not sufficient. The third party ought also to be prepared to show that he neither knew nor had reason to suspect that there was an undisclosed principal. Further, "Where a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or the principal respectively." (Sec. 234). It should be further noted that it has been laid down in England that when one signs a contract for another as agent, he is to be taken to contract as agent and is not personally liable even though in the body of the contract he purports to be the principal. *Universal S. N. Co. v. McKelvie & Co.*, (1923) W.N. 146.)

We have seen that the person untruly representing himself as an agent of another is liable to be sued for compensation by the third party with whom he enters into a contract under such false representation, if the principal does not ratify the contract, but what is more, the agent cannot enforce the performance of the contract on the third party. This rule is opposed to that of English law where the agent can enforce performance of such a contract (Secs. 235 and 236).

### Agent's signature on a bill of lading

Again, in the case of a bill of lading, an agent who has authority to sign on behalf of his principal must sign it as agent and make that fact clear in his signature. If the agent signs this document in his own name, he cannot render his principal liable thereon, except as per Section 28 of the Negotiable Instruments Act, i.e. where he was



instructed to sign his own name upon the belief that the principal alone would be held liable, in which case this defence is available only against the person who so instructed him to sign.

### Unauthorized acts of agents

Finally, if the agent has done anything, or incurred any obligation, without the authority of his principal, the principal will be bound by such act or obligations if he has by words or conduct induced the third party to believe that the agent had such authority (Sec. 237). All misrepresentations or frauds committed by agents while acting in the course of the business of the principal, have the same effect as if the misrepresentation or fraud had been made or committed by the principal himself. If, however, these misrepresentations or frauds were committed while acting beyond the scope of the agency the principal would not be bound by them.

### Breach of Warranty of Authority

There is, however, a case where an agent exceeds the authority given to him or where he acts in connection with the business of the principal without authority from him express or implied, and here the principal of course is not bound until he ratifies as we have already seen. If, however, the principal does not ratify the contract the agent becomes liable to pay damages to the injured party because there was a breach by him of warranty of authority which he gave to the third party which induced the third party to enter into a contract with him (*Collen v Wright*, (1856) 7 L & B 301). Thus the agent is liable to pay on the ground of breach of warranty of authority and not on the contract because in case of a contract neither the principal nor the agent is liable. Here, however, it is presumed that the agent while he exceeded the authority or acted without authority honestly believed that he had authority. If, on the contrary, he knew that he had no authority and acted in spite of that knowledge, he would be liable in an action for deceit. (*Randall v Grimen*, (1856) 25 L.J. C.P. 307.)

### Misrepresentation by agent

It should also be remembered that if an agent acting within the course of his authority commits fraud or misrepresentation, that would give the opposite party a right to set aside the contract the agent has entered into on behalf of his principal.

### Torts of agents

Any tort committed by the agent while acting in the regular course of business of his principal would make both the principal and the agent jointly and severally liable. [*Butt v Dine*, (1868) 3 Ch. 429.] For any tort committed by the agent outside the scope of his authority the principal of course is not liable.

### THE 'ADAT' SYSTEM

The Agency Law dealt with in this chapter is considerably modified by and applied in cases known as the *Pucci* and *Katchi Adat* systems. These systems have been carefully scrutinized by the High Court of Bombay in two leading cases and declared as **customs not unreasonable and therefore enforceable and good.** (*Bhagwandas Nanotemdas v. Kanji Dasa*, (1906) 30 Bom 205, *Fakuchand Lalchand v. Doolub Co. Ind.*, 7 Bom L.R. 213)

#### Pucci Adat

Under this system an upcountry constituent sends an order to the *Pucca Idatia* to purchase or sell any particular commodity for future deliveries the price being fixed by the negotiations. As soon as the bargain is closed, the *Pucca Idatia* in Bombay is bound to deliver goods at that price on the dates fixed by the contract and failing that he pays the difference between the market price and the contract price. To put it briefly, the contract is to find the goods or to pay the difference. The *Pucca Idatia* has no authority to pledge the credit of the upcountry constituent to the merchant from whom he may buy the goods by a covering contract. In fact it is not at all objectionable to the nature of this type of transaction that the *Pucca Idatia* sells to the upcountry constituent without having in the first instance entered into such a covering contract. The *Pucca Idatia* is thus virtually a principal entering into an independent contract with the upcountry constituent. In case of the covering contract also (where one exists) he stands in the same relation to the Bombay merchants, in which covering contract of course the upcountry constituent has no privity.

It will thus be seen that the *Pucca Idatia* is not an Agent at all in terms of the Agency Law.

#### Katchi Adat

Under this system the *Katchi Idatia* receives an order from the upcountry constituent for purchase or sale and sends for a broker to settle the rate. The broker who settles the rate guarantees to bring a party willing to buy or sell at that rate and as soon as that is done a regular contract is entered into between the party and the *Idatia*. If within the period intervening, the market rises above or falls below the rate so fixed, the profit in the former event goes to the broker on his securing the contract at a higher rate and in the latter case the loss arising through the fall of the market, has to be paid by the broker.

## CHAPTER VIII

### PARTNERSHIP

THE Indian Partnership Act, 1932, which came into force on the 1st day of October 1932 repeals Chapter XI of the Indian Contract Act, 1872, which prior to that date embraced the Indian Law of Partnership. It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

Partnership as defined by the new Act "is the relationship between persons who have agreed to share profits of a business carried on by all or any of them acting for all" (Sec. 4). The English Partnership Act, 1890, defines partnership as "the relation which subsists between persons carrying on a business in common with a view to profit,"

The persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which the business is carried on is called the "firm name" (Sec. 4). Thus the relationship of partners arises from contract and not from status, and the business of a Hindu joint family is not the business of partnership (Sec. 5).

It will thus be observed that the most important requirement in connection with partnership is the sharing of profits. If two or more persons combine under an agreement by which one or more of them is or are to share losses, but not profits, that would not constitute a partnership. In other words, the sharing of profits is a *prima facie* evidence, but not a conclusive evidence of partnership; because, as we shall see, there are specific instances in which though the persons share profits, they do not constitute themselves partners to the firm in which they so share profits, nor do they render themselves liable as partners to the creditors of the firm.

#### Illegal partnership

With regard to partnership, there is a further limitation which ought to be borne in mind and that is that there can be no partnership of more than 10 persons in a banking business, or exceeding 20 in a trading firm, because such a partnership would be in the unenviable position of not being able to sue and recover their claim in a court of law, nor can they be sued, or be wound up or enter into contracts. The members of an illegal partnership cannot call upon each other for contribution or apportionment with regard to losses paid by one or more of them on account of the partnership. Neither can they enforce accounts as to partnership dealings from their brother-partners. The only remedy in such cases is to get such an association incorporated under the Indian Companies Act. This principle was enunciated

in a recent Madras case (*Pannaji Devichund v. Senaji Kapurchand*, 50 Mad. 175), where four unregistered firms carried on a certain business in partnership and the total number of all the partners in all the firms exceeded twenty, this partnership of these firms was declared illegal.

### Sharing profits not conclusive evidence of partnership

We have seen that though the sharing of profits is a compulsory element to constitute a partnership, it is only the *prima facie* evidence and not conclusive evidence in that regard. Section 6 of the Indian Partnership Act, 1932, lays down that :—

- (1) The sharing of profits or gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.
- (2) The receipt by a person of (a) a share of the profits of a business, or (b) of a payment contingent upon the earning of profits, or (c) varying with the profits earned by a business does not of itself make him a partner with the person carrying on the business.
- (3) Particularly the receipt of such a share or payment as aforesaid in para. (2) does not of itself make the receiver a partner with the persons carrying on the business when such share or payment is received by :—
  - (i) a lender of money to persons engaged in or about to engage in any business, or
  - (ii) a servant or agent as remuneration, or
  - (iii) the widow or child of a deceased partner as annuity, or
  - (iv) a previous owner or part owner of the business as consideration for the sale of the goodwill or share thereof. ✓

Cases in which persons sharing profits cannot be made liable as partners are the following, as per Section 2 of the English Partnership Act, 1890 :—

“(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits.

“(2) The sharing of gross returns does not of itself create a partnership whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

“(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business and in particular—

“(a) The receipt by a person of a debt or other liquidated amount

by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such,

- “(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such (Sec. 42)
- “(c) A person being the widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner is not by reason only of such receipt a partner in the business or liable as such
- “(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner with the person or persons carrying on the business or liable as such
- “(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such

It may be added here that the profits is contemplated by law in these cases are net profit.

### Who is a partner

Whether a person is a partner or not is an open question in the absence of an express agreement and all the circumstances of the case, besides the incident of sharing profits would be taken into account by court of law in deciding whether a particular person was partner in the firm. In short whether a partnership between a given set of individuals exists or not is a question which must depend on the **real intention and contract of the parties**. (*Mollwo Muelch & Co v. Comr of Wards* (1882) 1 R. 4 P.C. 119) According to our new Act (1932) in determining whether a person is or is not a partner in a firm, regard shall be had to the **real relation between the parties as shown by all relevant facts taken together**” (Sec. 6)

In one case an agreement was entered into under which a person was to receive a commission on net profits made by a partnership in consideration of advances made by him to the firm and for his protection he was given certain powers of control. Here on these facts he was not considered to be a partner and liable as such.

### Partnership name

It may be further added that the partnership firm may carry on its business under **any name** it chooses. This name may either be

the name of one or more of its members, or a combined title embracing the names of all, or may be made up of a designation entirely different from the names of the members composing it. The name under which the business of a partnership is carried on is called the "**firm name**" (Sec. 4). In law, however, a partnership has no distinct existence like that of a joint-stock company, i.e. an existence distinct and independent of the members composing it. All that can be said with regard to the firm's name is that certain persons do business under the name and style of X, Y, Z & Co.

According to *Lindley on Partnership*, "The name of a firm is only a convenient mode of designating the firm composing it, and variation among these persons is productive of a new significance of the name. If, therefore, a legacy is left to the representative of an old firm, it will be payable to the executors of the last surviving partner constituting it and not to its successor in business." The firm's name, therefore, is only the title under which the partners are supposed to trade and all that can be claimed for it is that by a continuous use of that name in the long course of trading a goodwill may be acquired which may be of value. There is nothing to prevent other persons from using a similar name unless it can be shown that the use of such name would deprive other persons of the advantage of their goodwill by creating an incorrect impression on the minds of people that the persons represented by the name are the same parties as those making up the old firm whose name they are copying. (*Mussum v. Thorley's Cattle Food Co.*, (1880) 14 Ch. Div. 748.) This is a question of evidence to be decided in each case on its own merits.

### JOINT HINDU FAMILY FIRM

It may be stated here that a joint Hindu family firm possessing a trading business and created through the operation of Hindu law **must be distinguished from the ordinary partnership on many grounds.** The liabilities of the partners of such a firm are **governed mainly by Hindu law** on the principle of which joint Hindu family transactions are acknowledged and accepted. The joint Hindu family firm differs from a partnership in that the death of one of the joint owners does not put an end to the existence of the firm, nor can one of the partners who voluntarily severs his connection ask for an account for the past profits and losses. **The managing member** of the family can also pledge the family credit or family property for the purposes of the business of such a firm. If, on the other hand, the partnership is of a character where a certain number of members of joint Hindu family have joined with others (outsiders) the partnership will be governed by the Indian Partnership Act, 1932, and not by Hindu law.

### Who may be partners

Any person of full age and sound mind may be a partner whether a British subject or an alien. An alien enemy cannot be a partner

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#### Who may be partners

Any person of full age and sound mind may be a partner, whether a British subject or an alien. An alien enemy cannot be a partner



of a British subject. Alien enemies may not be partners during the continuation of hostilities. A minor, as we shall see later in some details, may not be a partner in a firm, but with the consent of all the partners for the time being, he may be admitted to the benefits of partnership (Sec. 30).

If one of the partners becomes a lunatic after his entering into partnership, that will be one of the grounds on which the other partners may apply for dissolution. A new partner in a partnership concern cannot be admitted unless all the original partners have unanimously consented. All who can enter into a legal and binding contract may, in short, be admitted into partnership.

A married woman can be a partner and as far as her partnership liabilities are concerned her separate property will be bound by it. All contracts entered into by her as the agent of the partnership will also bind her partners.

### A Minor Partner

A minor, who has been admitted to the benefits of partnership as dealt with above has a right to such share of the property and of the profit of the firm as may be agreed upon, and he may have access to and inspect any of the accounts of the firm. Such minor's share is liable for the acts of the firm, but the minor is **not personally liable** for any such act. In short the liability of a minor here is a limited liability, e.g. limited to his share in the property and profits of the firm. It is further provided that if **within six months** of attaining majority or of obtaining knowledge that he had been admitted to the benefits of the partnership (if the latter was done without his knowledge or consent) the minor gives a public notice that he had elected not to become a partner in the firm, that notice shall determine his position as regards the firm. In case he fails to give such a notice he shall become a partner in the firm on the expiry of the said six months, with the result that his rights and liabilities continue to be those of a minor upto the date he becomes such a partner, but for all acts of the firm done since that event, he shall become personally liable to the third parties. His rights as to the share in the property and profits of the firm as such partner naturally remain unaltered, i.e. he is entitled to the same share in the property and profits as he was during minority. Where, however, he severs connection after public notice he is entitled to sue and recover his share due to him at the date of such severance and he is not liable for any acts of the firm done after the date of such notice (Sec. 30).

### THE PRINCIPLE OF HOLDING OUT

The doctrine of holding out applies also to partnerships. If a ~~man~~ **person** who is not a partner, "by words spoken or written, or by his ~~conduct~~ **conduct**, represents himself, or knowingly permits himself to be ~~represented~~ **represented**, to be a partner in a firm, he is liable as a partner in that

firm to anyone who has on the faith of any such representation given credit to the firm" [Sec. 28 (1)]. The holding out may be effected in various ways, as in one case, viz. *Waugh v. Carver*, 14 R.R. 845, Eyre, C.J., says:—

"Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labour nor money and to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom without the others they would lend nothing."

It, therefore, follows that if a person who is a partner retires from firm he should give public notice of his retirement, otherwise he would be liable for debts of the firm to those who do not know of his retirement and give credit to the firm after his retirement under the belief that he is still a partner [Sec. 32 (3)]. This public notice of the retirement of a partner or expulsion of a partner has to be given in the local official *Gazette* and in at least one vernacular newspaper circulating in the district where the firm has its place of business. In the case of a registered firm it has to be given to the Registrar of firms also (Sec. 72). It has been further held here that besides giving public notice of retirement the partners retiring should also give actual notice to each of the old customers of the firm, as public notice only affects a new customer. (*Jwladutta Pillai v. B. Motilal*, 29 Bom. L.R. 1244.) It may be added here that even where a retiring partner takes a written contract from his other partners freeing himself from all liabilities of the firm, such an agreement would not be binding on the creditors of the firm unless these creditors are made parties to such an agreement [Sec. 32 (2)]. If they do not agree to do so, the position would be that the retiring partner would still be liable (granting that he has given public notice of his retirement) for the debts of the firm incurred during his tenure of partnership to the creditors of the firm and in his turn he would be entitled to be indemnified by his own ex-partners for any money that he may have to pay to such creditors. Of course, a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner. In case of the insolvency of his co-partners, however, after his retirement his position would be that he would have to pay out of his pocket the creditors of the firm to his last penny and put in his claim before the trustees of the insolvent for such money paid out.

The new Act further lays down that where after a partner's death the business is continued in the old firm name, the continued firm

of the name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

### **PARTNERS' LIABILITY FOR PARTNERSHIP DEBTS**

It has been laid down in England and in India that every partner is liable for all debts and obligations incurred while he is a partner in the usual course of the business by or on behalf of the partnership, but the person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such a firm for anything done before he comes in as a partner (Sec. 31). Thus it would be noticed that the liability of partners is limited with regard to debts of the firm incurred in the regular course of the business of partnership. Every partner is liable in India both jointly and severally for all acts of the firm done while he is a partner (Sec. 25). In the English Act the liability is only joint. The meaning of this rule is that if a debt is due from a partnership firm made up of, say, A, B and C, all the partners A, B and C must be sued in order to make them all liable for their debts. It, however, the creditor chooses to pick out only A he is, no doubt, at liberty to do so, but supposing that he fails in satisfying his debts out of the estate of A, he cannot proceed against B and C for the balance of the debts which remains unpaid. In India, however, the liability being joint and several the creditor can sue at his option either all jointly or each of them separately.

It should, however, be noted that a partner is liable only for debts incurred during the time that he is a partner. Thus, if a new partner is admitted into an old firm, he is not liable for any debts incurred by the said firm prior to the date of his joining the partnership unless one of the terms on which he is admitted into partnership is that he is liable for debts incurred prior to his joining the firm. This is, of course, a special agreement between him and his brother partners and as such the agreement cannot be taken advantage of by outsiders, i.e. creditors of the firm. Thus if X was a creditor of the firm for Rs. 10,000 prior to the new partner joining the firm of A, B and C and there was an express agreement that the new partner is to be liable to the debts of the firm in proportion to his share of profits, the said agreement can be enforced against the new partner by A, B or C, but the creditor cannot sue the new partner separately for payment of Rs. 10,000 or even a portion equivalent to the new partner's share in the profits.

### **Liability of Partners for Neglect or Fraud of Co-partners**

Where, by the wrongful act or omission of a partner acting in the ordinary course of business of the firm, or with the authority of his partners, loss or injury is caused to any third party, or any liability is incurred, the firm is liable therefor to the same extent as the partner (Sec. 26). The principle on which this rule is based is

that every partner is an accredited agent of the firm to carry on the business of partnership and that as the principal would be responsible for the neglect or fraud of his agent committed in the course of his employment, the firm is here liable for the neglect or fraud of one of its partners committed during the management of the business of the firm. It would be no defence for the other partners to say that they did not know of the fraud or did not participate in it. If, for example, one of the partners receives money in the course of the business of the firm and disappears with it or misappropriates it for his own use and then becomes insolvent, the firm has to make good that money. This principle is now laid down in Sec. 27 of the Indian Partnership Act, 1932, where it is laid down that the firm is liable to make good the loss where (1) a partner acting within his apparent authority receives property or money and misapplies it, or (2) the firm receives it and any of the partners misapplies it. In one case one of the partners obtained certain information from a clerk of a competing firm by bribing him, and used that information for the benefit of his firm and to the harm of the competing firm. It was held that his partners were liable to pay compensation to the competing firm. (*Hamlyn v. Houston & Co.*, (1903) 1 K.B. 81.) It must be noticed here that the neglect or fraud ought to have been committed in the regular course of the business of the firm in order to make the other partners liable; e.g. it has been decided that in the case of solicitors when money is given to them to be invested by them in a specified manner, it is said to be so entrusted to them in the regular course of the business, and if, therefore, one of the members of the firm receives the money and misappropriates it, the firm would be liable. (*Blair v. Bromley*, (1847) 2 Ph. 354.) If, however, the money was given to a partner with certain instructions to invest at the discretion of the partner, the payment is not held to have been made in the regular course of the business of the firm and, therefore, misappropriation by a member of the firm is not binding on the firm. (*Harman v. Johnson*, (1853) 22 L.J.Q.B. 297.) Of course as between partners themselves Sec. 10 expressly provides that "Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm."

## POWERS AND DUTIES OF PARTNERS

Every partner has, generally speaking, the power to do all acts necessary for, or usually done in, carrying on the business of the partnership, of which he is a partner, unless there is an agreement to the contrary. A partner, subject to the provisions of the Indian Partnership Act, 1932, is the agent of the firm for the purposes of the business of the firm (Sec. 18). Thus the act of a partner which is done to carry on in the usual way, business of the kind carried on by the firm binds the firm, provided it is done and executed in the

firm name or in any other manner expressing or implying an intention to bind the firm (Secs. 19-22).

It would thus be seen that it is quite open to the members of a firm to enter into a mutual agreement under which they can restrict the power of any of the partners by arranging that certain members should only attend to a particular branch of the business and enter into contracts with regard to that branch only, and that certain others should look after other branches of management or take no active part except in financing the business. Such an agreement would, no doubt, be binding upon the partners and also on those who are aware of, or who had notice of, those terms in the partnership agreement. In short, the agreement to this effect would be binding upon the partners among themselves. The result would be that if one of the partners, in spite of an agreement to the contrary, were to enter into a contract in the regular course of the business of the firm which by agreement he was not entitled to do, (an innocent outsider would not be bound by such a clause in the partnership agreement of which he had no notice and can still look to the firm for his payment. *It* is, however, open to the firm to pay the money and obtain compensation from the partner who has violated the clause in the partnership agreement.) Besides, the general powers of partners are limited only to the doing of those acts which are usual and necessary in the ordinary course of the business of the firm and, therefore, they do not confer any extraordinary powers because it has been laid down that "a power to do what is usual does not include a power to do what is unusual, however urgent." (*Lindley on Partnership*).

### What a Partner Cannot Do under Implied Powers

In the absence of usage or express authority from all other partners, the implied authority of a partner does not empower him to—

- (1) submit a dispute relating to the business of the firm to arbitration,
- (2) open a banking account on behalf of the firm in his own name,
- (3) compromise or relinquish any claim or portion of a claim by the firm,
- (4) withdraw a suit or proceedings filed on behalf of the firm,
- (5) admit any liability in a suit or proceedings against the firm,
- (6) acquire immoveable property on behalf of the firm,
- (7) transfer immoveable property belonging to the firm, or
- (8) enter into partnership on behalf of the firm [Sec. 19 (2)].

### Special Agreement, Emergency and other Incidents

Of course by a special agreement it is open to partners to extend or even restrict the implied authority of any partner, but this is subject to the rule that any such restriction shall not bind an innocent outsider who deals with a partner within his implied authority without knowing of such restriction (Sec. 20). In an emergency, however, a partner

has authority to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts will bind the firm (Sec. 21). In any case, the act or instrument done or executed by a partner or other person on behalf of the firm must be done or executed in the firm name or any other manner expressing or implying an intention to bind the firm (Sec. 22). On the same principle, an admission or representation by a partner concerning the affairs of the firm is evidence against the firm if made in the ordinary course of business (Sec. 23). Notice to a partner habitually acting for the firm of a matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (Sec. 24).

### Conduct of Business and Mutual Rights and Liabilities

Subject to contract between partners—

- (1) every partner has a right to take part in the conduct of the business ;
- (2) every partner is bound to attend diligently to his duties in the conduct of his business ;
- (3) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ;
- (4) every partner has a right to have access to and to inspect and copy any of the books of the firm ;
- (5) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;
- (6) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;
- (7) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;
- (8) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum ;
- (9) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—
  - (i) in the ordinary and proper conduct of the business, and
  - (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ;

- (10) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm (Secs 12-13).

### **Continuation after expiration of term**

Where a partnership is formed for a fixed period and on the expiration of that period the partners continue business, the presumption is that the mutual rights and duties of the partners (unless there is an agreement to the contrary) remain the same as they were before the expiration of the term and the partnership thereafter is naturally to be taken as a partnership at will and the mutual rights and duties as stated above are to continue in so far as they are consistent with the incidents of partnership at will (Sec 17)

### **INTEREST ON CAPITAL**

Partnerships are formed between individuals bringing in capital at varying figures, and while adjusting accounts at periodic intervals, interest at a fixed rate per cent is frequently allowed on the capital to each of the partners concerned. It may, however, be noted that in law no partner is entitled to claim interest on his capital in the absence of an agreement express or implied. If the partnership has been carrying on business for some length of time, during which time accounts have been periodically balanced after allowing interest on the capital of the partners, that circumstance will help to prove that there was an implied agreement between the partners to allow interest on the capital brought in by each member of the partnership. If, however, no agreement as to interest exists, and if there is no indication of it in the accounts of the type referred to above, the partner who brought in his agreed share of capital cannot claim interest on it, in case any of the other partners fails to bring in his agreed share of capital in full even in winding up. The advances made by one or more of the partners to the firm, over and above the agreed share capital, do not fall under this rule as such advances are to be treated as loans from the partners concerned (unless otherwise agreed) on which the partners advancing will be entitled to simple interest at the rate of 6 per cent.

### **PROPERTY AND PROFITS OF THE FIRM**

All property, rights and interests finally brought into the firm or acquired by or for the firm by purchase or otherwise become partnership property subject to contract between the partners. This property naturally includes the goodwill of the business. All partnership property must be held and used by the partners exclusively for the purposes of the business, subject of course to any contract between them (Secs 14-15). Unless there is an implied or express contract between the partners to the contrary, all profits derived by a partner for himself or from the use of partnership property, business connection or name

or through any competing business carried out by him must be accounted for and paid by him to the firm (Sec. 16.)

### DISSOLUTION OF PARTNERSHIP

A partnership firm may be dissolved by mutual agreement or consent of all partners at any time (Sec. 40). Where it is a partnership at will, the same may be dissolved as from the date mentioned in the notice given in writing by any partner to all other partners. If no such date is mentioned it is dissolved from the date of the communication of the notice (Sec. 43).

A firm is dissolved **compulsorily** when all partners, or all but one partner, are adjudicated as insolvents, or where an event has happened which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership (Sec. 41).

A partnership is also dissolved (subject, of course, to contract between partners) (1) by the expiry of the term if it is for a fixed term, (2) by the completion of one or more enterprises to carry on which the partnership was constituted; (3) by death of a partner; and (4) by the adjudication of a partner as an insolvent (Sec. 42). In this case the adjudicated partner ceases to be a partner on the date on which the order of adjudication is made irrespective of the fact whether the firm is dissolved or not (Sec. 34). Where by a special contract between partners the firm is not dissolved on the death of a partner the estate of the deceased partner is not liable for any act of the firm done after his death (Sec. 35).

### Outgoing Partner's Right to Compete

An outgoing partner is free to carry on a business of a competing nature, unless he has given an agreement to his other partners that on ceasing to be a partner he will not carry on such business for a specified period or within specified local limits. This agreement will be binding on the outgoing partner, if the restrictions imposed as above are reasonable. When he has not given such an agreement restraining himself and wishes to carry on a competing business, he should see that he does not use the firm name in connection with his own new business or represent himself as carrying on the business of the old firm or solicit custom of persons who were dealing with the old firm before he ceased to be its partner. These restrictions are also subject to an agreement to the contrary with the old partners (Sec. 36).

### Outgoing Partner and Subsequent Profits

Where a partner retires or dies and the continuing or surviving partners carry on the business of the firm without any settlement of accounts as between them and the outgoing or deceased partner, then, unless there is some special contract to the contrary, the outgoing partner or the estates of the deceased partner will be entitled to ~~some~~



share of the profits made since they ceased to be partners as may be attributable to the use of their share or to interest at the rate of six per cent per annum on the amount of their share in the property of the firm (Sec. 37).

### **Dissolution by a Suit**

A partner can, by bringing a suit, get a partnership dissolved on any of the following grounds :—

- (1) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;
- (2) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;
- (3) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;
- (4) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;
- (5) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land revenue or of any dues recoverable as arrears of land revenue due by the partner ;
- (6) that the business of the firm cannot be carried on save at a loss ; or
- (7) on any other ground which renders it just and equitable that the firm should be dissolved (Sec. 44).

### **(1) LUNACY**

In this case a suit may be brought either by the next friend of the partner who is so incapacitated or by any of the other partners of the firm. Of course, until such a suit is filed and a decree of dissolution obtained the partnership is not dissolved. It has been laid down in England that "when a partner is affected with insanity the continuing partner may, if he thinks fit, make it a ground of dissolution but in that case I consider, that in order to make it a ground for dissolution he must obtain a decree of the court. If he does not apply

to the court for a decree of dissolution it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carries on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope, there can be no dissolution." (*Jones v. Noyz*, M.N.K. 125.)

## (2) INCAPACITY

Incapacity here should be permanent. This principle was laid down years ago in England where in one case a partner was incapacitated through a paralytic attack from performing his duties as a partner, but it was proved that his health was improving and that his incapacity was temporary. The court thereupon refused to pass a decree of dissolution. (*Whiteull v. Arthur*, 35 Bear. 140.)

## (3) & (4) MISCONDUCT AND WILFUL BREACH

Where a partner is guilty of conduct which is likely to affect prejudicially the carrying on of the firm's business, say when he commits a fraudulent breach of trust, it is open to his other partner or partners to apply for a dissolution with a view to get rid of him. Similarly, where there is a persistent breach of agreement relating to the management of the affairs of the conduct of its business which makes it impracticable for other partners to carry on business in partnership with him, any of his partners can move the court for a decree of dissolution with a view to get the offending partner removed. In these cases the principle involved is that mutual trust and confidence which is the essence of partnership can no longer subsist under the circumstances.

## (5) TRANSFER OF SHARE

If a partner transfers, assigns or mortgages the whole of his share to an outsider that is a ground for any of his partners to apply to the court for the dissolution of partnership. The transferee or sub-partner in such a case acquires no right to an account from the firm or any of its members except the one whose sub-partner he happens to become by such a transfer. On the same principle, if a partner mortgages his share, the mortgagee will not acquire a right to an account with regard to profits from the other partners. He has to look to his mortgagor to settle this item for him in the case of a dissolution. However, the mortgagee or creditor or co-partner would acquire a right to account as from dissolution. Section 44 (c) further provides that if a partner has allowed his share to be charged under the provisions of Rule 40, Order XXI of the Code of Civil Procedure, 1908, the result will be the same, i.e. it will give a right to any of the other partners to apply to the court for a dissolution order. Under this order it is provided that the Court may on the application of the holder of a decree against the partner make an order charging

the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require.

The other partner or partners shall be at liberty at any time to redeem the interest charged, or in the case of a sale being directed, to purchase it.

### (6) ONLY AT A LOSS

The court will allow dissolution on the ground of loss where it can be shown that though the term fixed by contract for the duration of partnership is unexpired, the business can be carried on only at a loss and there is no chance of making profits in the future.

### (7) JUST AND EQUITABLE

The Indian Partnership Act, 1932, has left the door open by which the court can order dissolution "on any other ground" which renders dissolution just and equitable. It may be noted here that in case of the Companies Acts of England and India a "just and equitable" clause exists similar to this under which the court can decree a compulsory winding up of a company. According to older decisions the ground on which the dissolution is asked should be *ejusdem generis* to those laid down above in the preceding clauses. The latest decision of the Privy Council on this point is *Loch v John Blackwood*, (1924) A.C. 783 and which is followed by the Madras High Court in *Sabapathy Rao v Subapathy Pious Co., Ltd.*, 46 Mad 448, where it is held that this provision does not restrict the court to the grounds similar to those enumerated in the section, but the courts are free to decree a dissolution in any case whatsoever where in their opinion it is just and equitable that such an order should be passed.

### Public Notice of Dissolution

The act makes it clear that on the dissolution of a firm a public notice should be given, failing which the partners continue to be liable for the act of any one of them which would have been the act of the firm if done before dissolution. This, of course, does not apply to the estate of a partner who dies or is adjudicated an insolvent for acts done after such person ceases to be a partner (Sec. 45).

### Rights after Dissolution

All partners or their representatives have a right to have the property of the firm applied in payment of debts and liabilities of the

firm and to have the surplus distributed among the partners or their representatives. The authority of each partner to bind the firm and the other mutual rights and obligations continue notwithstanding dissolution so far as may be necessary to wind up the affairs of the firm, also with regard to the completion of a transaction begun, but unfinished at the time of the dissolution. This rule of course does not apply to a partner who has been adjudicated insolvent (Secs 46-47).

### Premium and Premature Dissolution

Where a partner has paid a premium on entering upon partnership without any special provision with regard to the return of it on dissolution, the Indian Partnership Act, 1932, lays down in Section 51 that in such cases where the firm is dissolved before the expiry of the term, otherwise than by the death of any partner the premium or such part thereof as may be reasonable should be repaid, regard of course being had to the terms on which he became a partner and the length of time for which he continued as such. This rule of course will not apply where (1) the dissolution was mainly due to his own misconduct, or (2) was brought about in pursuance of an agreement containing no provision for the returning of the premium or any part thereof.

### Partnership through Misrepresentation

If a person is induced to become a partner through the misrepresentation or fraud of any of the partners, the misrepresented partner on rescission of the contract will have a lien or right of retention on the surplus of the assets of the firm after payment of its debts, for any sum that he may have paid for the purchase of his share or as contribution towards his capital. He also ranks as a creditor of the firm in respect of any payment made by him towards the debts of the firm. Besides these he has a right to be indemnified by the partner or partners guilty of fraud or misrepresentation against all the debts of the firm (Sec 52).

### Payment of Firm's and Separate Debts

It frequently happens that when a firm is being dissolved, particularly in an insolvent condition, there is not enough money to go round to the creditors of the firm on the one hand and to the separate outside creditors of each partner on the other hand. In such a case according to Sec 49, the joint debts of the firm have to be first met from the property of the firm and the outside and private debts of each partner have to be in the first instance paid from the separate property of each partner concerned. If there is any surplus either way, it is transferred into the payment of either the firm's debt or the individual partner's debt as the case may be.

## ACCOUNTS AND THEIR INSPECTION

The usual practice among business men is to keep separate accounts of each partner in the partnership ledger, and to credit each partner with his share of capital actually brought in, plus all advances on account of capital. This account is debited with all withdrawals on account of capital. The profits made are also credited to this account in the proportion agreed upon and losses debited. The withdrawals for personal expenses or against profits are also debited. Every partner has a right to see that proper accounts of the partnership transactions are maintained which should be open for the inspection of every partner. It is within the right of every partner to get these accounts inspected by any agent he appoints (particularly an expert), provided, of course, that the agent is a person against whom no reasonable objection can be raised by the other partners (*Bruton v Webb*, (1901) 2 Ch 59)

It may be added that in cases where the court directs the accounts to be taken all partners who are in possession of these books and vouchers must produce them, failing which the party who withholds, or who is guilty of having destroyed them, will find all presumptions against him.

### Continuing Guarantee

We have also seen that a continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of an agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which or in respect of which, such a guarantee was given (Sec 34)

### Joint and Separate Debts

Where there are joint debts due from the partnership and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

The principle, as laid down in the section, has been long established in England. Lord King, in *ex parte Cook* 2 P W 500, used the following words — It is settled, and is a resolution of convenience that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors, and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors,

it shall go to supply any deficiency that may remain as to the joint creditors.

### Partner's Rights and Obligations after Dissolution

After the dissolution of partnership the rights and obligations of the partners continue in all things necessary for the winding up of the business of the partnership.

### ACCOUNTS ON A WINDING UP

The principle on which the partnership accounts ought to be finally settled on a dissolution are now laid down in Sec. 48 of the Indian Partnership Act 1932 as follows:

In settling the accounts of a firm after dissolution the following rule shall, subject to agreement by the partners be observed:

- (a) Losses including deficiencies of capital shall be paid first out of profits, next out of capital, and lastly if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm including any sums contributed by the partner to make up deficiency of capital shall be applied in the following manner and order:
  - (i) in paying the debts of the firm to third parties,
  - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital,
  - (iii) in paying to each partner rateably what is due to him on account of capital, and
  - (iv) the residue if any shall be divided among the partners in the proportions in which they were entitled to share profits.

It may be added here that a suit for accounts in dissolution of partnership is to be brought within three years of the date of dissolution.

It may be further noticed that each and every partner has a right, on dissolution, to insist on a sale of the partnership assets. No partner, in the absence of an agreement to that effect, can claim to have his own share or that of his partner valued by a valuer or to have it divided in specie. Besides the right of winding up the affairs of a partnership in dissolution is a personal right belonging to each of the members of the firm which cannot be taken out of the hands of the other partners by the personal representatives or trustees of a deceased or bankrupt partner. The general rule with regard to the above is stated thus: "On the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities shall be divided among the partners according to their respective shares in capital" [*Darby v Darby*, (1856) *Crew*, p. 503]. Here the goodwill or the value attached to the firm's name must also be sold for the

common benefit of all the partners. [*Levy v. Walker*, (1879) 10 Ch. Div. 446.]

### GOODWILL

Goodwill plays so important a part in partnership affairs that it will not be out of place to deal with it here.

Goodwill is defined as **any advantage** that a firm or a company enjoys through the **established reputation** and the **business connection** which it has built up through previous dealings, advertisement, etc. If a new partner joins a firm with an established reputation, he, no doubt, obtains the ready benefit of the firm's reputation which was established through the exertions of the old partners; or, where the firm's business is sold, the new owners of the business would benefit through its established reputation, thereby gaining a ready connection which would otherwise have to be established through incessant work for a number of years. Mr. Justice Warrington [*Hill v. Ferris*, (1905) 1 Ch., p. 471] defines goodwill as follows:—"The goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on, and by being entitled to represent to the outside world, that he is carrying on a business which has been carried on for sometime previously."

It is also defined by Lord Eldon in *Cruttwell v. Lyc*, (1810) 17 Ves. 356, as—

"The possibility that the old customers will resort to the old place."

Of course these are not comprehensive definitions, but they will give the student an idea as to what the term "goodwill" embraces.

In the case of partnerships it has been taken as settled law that in the absence of an express agreement, **goodwill is the common property of the firm's partners**. It will be seen that where a partner retires from the firm or when he dies, he or his heirs will be entitled to see that the figure of goodwill is included in the calculation of capital.

In the case of an **outgoing or deceased partner**, the calculation of capital to be paid to him should be made up to the date of his retirement or death, including profits, made up to that date, and his share of the goodwill in the firm. This has to be done because, according to partnership law, the partnership is dissolved from the date of the death of a partner, his bankruptcy or of course, the date of his retirement. On these occasions the calculation of goodwill gives rise to difficulties, in case the partnership agreement does not include clauses clearly stating the lines on which the goodwill is to be calculated. Under these circumstances, the only method of arriving at goodwill is by valuation, and the proportion to be credited to the deceased partner's capital account is the proportion of the valuation, according to his share of the profits of the partnership. The partnership agreement generally provides for calculation on the basis of so many years' average profit or, as is often the case, it is agreed

that for a certain number of years a fixed annuity, or a fixed share of net profits, should be paid to the outgoing partner or his representative. The person who purchases the goodwill should see that an express agreement is taken from the vendor not to carry on another similar business or to solicit old customers and when that is done not only is he bound but the principle also extends to his executors. [*Boone v Wicker*, (1927) 1 Ch 607]

## REGISTRATION OF FIRMS

The Partnership Act of 1932 has introduced a new departure, viz registration of partnership firms. Though registration is optional and not compulsory in the sense that no penalty is imposed, the sections are so framed as to provide a medium for sufficient indirect pressure to be brought to bear on partner to have the firm and themselves registered as we shall see presently. It may be added, however, that the sections as to Registration came into force as and from 1st October 1933.

The idea is that the registration should be introduced gradually in such provinces as are sufficiently developed for the purpose and to leave off undeveloped areas for the present; thus the Governor General in Council is given the power by notification in the *Gazette of India* to direct to what province or any part of it the provisions applying to registration shall not apply (Sec. 56).

### How to Register

The registration is to be effected by officers known as Registrars of firms of the respective area by either sending through the post or delivery in person a statement on a prescribed form with a prescribed fee. The statement is to contain (1) the name of the firm, (2) the principal place of business of the firm, (3) names of any other places where the firm carries on business, (4) the date on which each partner joined the firm, and (5) names in full and permanent addresses of the partners and the duration of the firm. This statement must be signed by all partners or their duly authorized agents.

### Restriction as to Name

The usual restrictions imposed on joint-stock companies as to the use of words in connection with their names such as "Crown", "Emperor", "Empress", "Imperial", "King", "Queen", "Royal", or words expressing or implying the sanction, approval or patronage of the Crown or of the Government of India or local Government are also made applicable to registered firms (Sec. 58). All alterations in the name or location of the principal place of business of such a firm have also to be notified to the Registrar in similar fashion (Sec. 60). Similarly, a change in the constitution has to be notified either by an incoming, continuing or outgoing partner. A dissolution may also be



notified by a partner or an agent of a partner who was a partner immediately before the dissolution.

### Registration and Minor Partner

When a minor is admitted to the benefits of partnership and the said minor attains majority he may notify whether he elects to become a partner or not. The registrar in all these cases makes a record of such notice on his register. The registrar may be notified as to any mistake by the registrar himself or the court deciding any matter relating to a registered firm may direct the registrar to make any amendment of the entry in the register of firms relating to such firms which is consequential upon its decision (Secs. 64 5). The register is open for inspection to any person on payment of the prescribed fee, together with all statements notified and intimations filed (Sec. 66).

### EFFECT OF NON-REGISTRATION

The effect of non-registration is that a partner cannot file a suit to enforce a right arising from a contract or conferred by this Act against the firm or against any person who is alleged to be a partner in the firm unless the said firm is registered and the person who is or has been shown in the register of firms as a partner in the firm. On the same footing a firm cannot sue in any court a third party on any right arising from a contract unless the said firm is registered and the persons suing are or have been shown in the register of firms as partners of the firm. These rules will also apply to a claim for set-off or other proceedings to enforce a right arising out of a contract, but shall not affect the following, viz. :—

- (a) The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or
- (b) the powers of an official assignee, receiver or court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realize the property of an insolvent partner.

The only exception in this case being firms or partners in firms having no place of business in British India or having places of business situated in areas to which the Government notification does not apply and to a suit or claim of set-off not exceeding Rs. 100 in value.

The Select Committee Report states that the position created is that the third party's right to sue the firm is kept intact, but in case of suits by the firm or partners *inter se* or against third parties, registration is compulsory, as such suits cannot be filed by unregistered firms, or their partners. In case of suits against third parties, it is open to the firm to get registered as soon as litigation is in sight. The effect of this regulation, it is submitted, is that partners of every responsible firm would prefer to get registered because otherwise they

may not be able to file suits against the firm or against one or more of their partners.

### **False Statement**

A penalty which may extend to an imprisonment upto three months with or without fine is laid down for any person who signs any statement, or amending statement, or notice, or intimation in connection with registration of firms, in which a false statement appears which to his knowledge happens to be false or which he does not believe to be true.

## CHAPTER IX

### CONTRACTS OF INDEMNITY AND GUARANTEE

#### Indemnity

✓ INDEMNITY is defined by the Contract Act as a contract by which one party promises to make good to the other any loss that may be sustained by him by the conduct of the promisor himself, or by the conduct of any other person. As, for example, if A contracts with B and undertakes to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of Rs. 200, the contract will be a contract of indemnity (Sec. 124). Thus in an indemnity contract there are two parties, the party which promises to save the other from loss and the promisee, as for example A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of Rs. 200. This is a contract of indemnity. As to when the indemnifier's liability commences and the extent of his liability, is not clearly laid down by our Act, but the English decisions and authorities are followed by our Indian Courts. (*Osman Jamal & Sons Ltd. v. Gopal Purshottam*, (1928) 56 Cal. 262, 118 I.C. 882.)

Indemnity is thus defined in Halsbury's *Laws of England*: "An indemnity is a contract expressed or implied, to keep a person, who has entered into, or who is about to enter into, a contract or incur any liability, indemnified against loss, independently of the question whether a third person makes a default."

It will thus be seen that indemnity in English law has a much wider meaning, because there the loss would have to be paid independently of the question whether a third, or, as a matter of fact, any person has made a default.

#### Guarantee

A contract of guarantee, on the other hand, is defined by the Contract Act as "a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'." Thus in a contract of guarantee there are three parties, viz. (1) the surety, (2) the principal debtor and (3) the creditor. In Indian law "a guarantee may be either oral or written" (Sec. 126). Thus where A guarantees to B that if he lends Rs. 3,000 to C, C shall pay the amount within the stipulated time in accordance with his

agreement, failing which A shall make good that amount, or in case of an ordinary agreement of sale of goods if A guarantees B that if he gives credit to C in connection with the goods he sells to C for a particular duration, C shall pay the cost of the goods B sells to him, failing which he (A) shall be responsible to make good the amount due either in full or upto a certain limit, it is a contract of guarantee. In English law a guarantee is defined as "a promise made by one person to another to be collaterally answerable for the debt, default or miscarriage of a third person."

### THE DIFFERENCE

✓ It will be seen, therefore, that in the case of a guarantee the primary responsibility lies on the principal debtor and the surety's obligation depends substantially on the default of the principal debtor. If there was no principal debtor, or if the principal debtor was there but the surety took upon himself the primary responsibility of paying the debt, it will come under the heading of indemnity and not of guarantee. Our section also makes contracts of guarantee binding even when they are oral, whereas, in England, under the Statute of Frauds, contracts of guarantee must be evidenced by a memorandum or note in writing. ✓ It may be added here that it is necessary that these contracts should be supported by consideration like all other simple contracts. It will be considered a sufficient consideration if anything is done or promised by the creditor for the benefit of the principal debtor, surety or any other person. The other point is that the guarantor is "collaterally liable" and therefore if he pays, the principal debtor is not released from his liability but the guarantor steps into the shoes of the creditor.

The contracts of guarantee and indemnity should be supported by consideration like all simple agreements. In other words, all rules as to consideration apply to them.

### Promisee in Indemnity Contracts

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor :—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit ;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of

indemnity, or if the promisor authorized him to compromise the suit (Sec. 125).

Under this section the person who is indemnified against losses and damages may not only recover the losses and damages that he may have to pay, but he is also entitled to recover costs of defending any suit that may be brought against him, in connection with this contract of indemnity, provided, of course, that he does not defend this suit contrary to the orders of the promisor and that in conducting the suit he acts as a reasonable and prudent man would have acted in his own case. Again, if the promisee compromises the suit with the authority of the promisor, he would be entitled to recover the amount paid towards the compromise from the promisor. If he acted without consulting the promisor, even then the amount paid as compensation could be recovered if he could prove that the compensation was not contrary to the orders of the promisor and was one which it would have been prudent for the promisee to make if there was no contract of indemnity.

### The Surety in Guarantee Contracts

The liability of the surety is co-extensive with that of the principal debtor, unless the contrary is provided for, as, for example, if a person guarantees payment of a bill of exchange, and the bill is not paid, he would not only have to pay the amount of the bill that the principal debtor should pay, but also any interest that the principal debtor would be liable for (Sec. 128).

Where a guarantee is given for a running balance of account, say by A to B, not exceeding Rs. 1,000 with respect to debts contracted between B and C and supposing that C becomes insolvent and the debt owing to B is Rs. 1,500 on which a dividend of 8 annas a rupee is paid, say in all Rs. 750, A can be called upon to pay the balance of Rs. 250 only. Here it has been clearly laid down that the creditor B cannot claim from A his whole loss of Rs. 750 in this case as the guarantee was for Rs. 1,000. Of course, by a special agreement his position may be altered but in that case the condition that such a rule was not to apply ought to be clearly expressed. (*Bardwell v. Lydall*, (1831) 7 Bing. 489; *Hobson v. Bass*, (1871) L.R. 6, Ch. 792-94.) Thus where X guarantees to the landlord Y that Z the tenant will pay the rent and if he fails to do so X will be liable to pay up the amount, X is only liable to pay the rent and not interest thereon, unless the guarantee agreement itself expressly stipulates that X's liability will include the interest on such rent if Z the tenant fails to pay. (*Maharaja of Benares v. Harnarain Singh*, (1906) 28 All. 25.) However, if Y the landlord has obtained a decree against Z for non-payment of rent, Y cannot enforce that decree against X the guarantor, but he must in a separate suit prove the liability of the guarantor or surety, viz. X, unless it is provided in the contract of guarantee that a judgment or award against the tenant or principal debtor will be

binding or admissible against the surety. (*Hajarimal v. Krishnaray*, (1881) 5 Bom. 647.)

### Specific or Continuing Guarantee

A specific guarantee is a promise to be collaterally answerable for one specific transaction only or which comes to an end on repayment of the advance for which it was given.

A guarantee is a continuing guarantee when it extends to a series of transactions (Sec. 129); e.g. where A in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible to the amount of Rs. 50,000 for the due collection and payment by C of those rents, it is a continuing guarantee.

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor. Of course, for all transactions entered into previous to the given notice, the guarantee would be binding on the guarantor (Sec. 130).

Of course, this section (Section 130) applies to cases where a series of distinct and separate transactions are contemplated; the words "future transactions" seem to imply that if the continuing guarantee is given for an entire consideration it cannot be revoked during the continuation of the relationship which constitutes that consideration, unless a material change occurs in the situation, such as dishonesty of the person whose fidelity is guaranteed, in which case the surety may, if he likes, ratify or revoke the guarantee contract.

### Liability of the Surety

Only in the case of default by the principal debtor, can the creditor proceed against the surety immediately, and is not bound to sue the principal debtor in the first instance unless the guarantee lays down that specifically. The creditor cannot be precluded from taking this action even on the ground that he holds securities belonging to the debtor.

### Termination of Guarantee

The guarantee may be terminated by—

- (1) Revocation (Sec. 130),
- (2) Death of the surety (Sec. 131),
- (3) Variation of contract without consent of surety (Sec. 133),
- (4) Discharge by creditor of the principal debtor without consent of surety (Sec. 134),
- (5) Compounding with principal debtor by creditor without consent of surety (Sec. 135).

In the second case it is not necessary that the creditor should have known of the death of the surety, and even where the creditor has entered into fresh transactions after the death of the surety without knowledge of such death, the rule will come into force and the surety would not be responsible for such transactions entered into

after death. Of course, this rule is subject to an agreement to the contrary. As to all debts incurred previous to his death, the surety will be liable. In English law notice to the creditor of the surety's death is necessary to bring the liability of the surety to an end.

Section 132 lays down the rule applicable to cases where two persons contract with a third person to undertake certain liabilities and also contract between themselves that one of them shall act as surety, whereas the other shall be personally liable for the whole debt to the creditor. As far as the creditor is concerned, such an agreement between these two persons will not affect his position and he can hold both of them responsible under the contract as principals. This holds good under this section even though the creditor knew of the existence of this arrangement between these two debtors at the time the contract was entered into by them with him, on the ground that the second agreement between the debtors by which one debtor makes himself responsible for the full amount and makes the other debtor's liabilities that of a surety will not bind the creditor who is not a party to it. This rule is opposed to the rule in English law where the relation between these two debtors, viz. that of the principal debtor and the surety, will affect the consequences of the contract. As for example, if A and B give jointly and severally a promissory note to C, and if A signs the note on the understanding that he signs as the surety of B and that B is the principal debtor who is to pay for the note, the fact of C, the creditor, knowing this will not affect A's position in India and A will be bound to pay as the principal debtor and not as the surety for B.

### Variation in the Terms of a Guarantee Contract

✓Any variation made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variation (Sec. 133)✓

This rule is wide and general whereas the rule in the English law lays down clearly, that the sureties will not be discharged under the circumstances above mentioned, unless the alteration is of a particular nature which would prejudice the rights of the surety. In India, on the contrary, it appears that even if the alteration were to be of a nature which would be beneficial to the guarantor, it would entitle him to claim a discharge.✓

✓The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor (Sec. 134); e.g. A gives a guarantee to C for goods to be supplied by C to B. C supplies the goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is

discharged from his suretyship. This is because the surety is entitled in case he is called upon to pay to be placed in the position of the creditor, and to acquire all the rights which a creditor possesses against the debtor. It, therefore, the creditor by any act or omission the legal consequence of which is the discharge of the principal debtor, deprives the surety of that right which the surety is entitled to claim, the surety is released. Also, where the default of the principal debtor was brought about through the convenience of the creditor, or through gross negligence on the part of the creditor, the same rule will apply. In one case, where the creditor instituted a suit against the principal debtor as well as the surety on a contract and subsequently waived his claim against the principal debtor, it was held that the surety was also discharged from his liability. A discharge of the principal debtor in the insolvency court does not, of course, discharge the surety.

#### **Failure to sue within the Period fixed by the Limitation Act**

Where the creditor fails to sue the principal debtor within the period fixed by the Limitation Act, the surety is not discharged, according to the judgments of the High Courts of Madras, Bombay and Calcutta. The High Court of Allahabad has held differently but the English decisions are the same as those of the High Courts of Bombay, Madras and Calcutta. The Madras High Court has argued that barring by limitation does not discharge the debtor from his obligation as far as the debt is concerned, whereas in England the ground on which the surety is not discharged is that the surety himself could have brought an action against the principal debtor before the expiration of the time limit (*Sanakuna v Unupakasha*, 7 Bom. 146; *Krishna Kishori Chowdhrao v Rudha Ramun Munchi*, 12 Cal. 330; *Subramania Aiyar v Gopalra Aiyar*, 33 Mad 308; *Ranjit Singh v Naubat*, 24 All. 504.)

#### **Compounding with Principal Debtor**

If the creditor arranges with the principal debtor without consulting the surety for composition or agrees to give time or agrees not to sue him, these acts will immediately discharge the surety (Sec 135). It is held that the creditor has no right in law to give time to his debtor without the consent of the surety, even where the time given may have been with a view to protect the interests of the surety or for his benefit. It has also been held that where time is given for a part of the debt, the surety would be discharged only with regard to that part. Of course, if there is an express clause in the guarantee agreement, entitling the creditor to give such time, that agreement will hold good. If, however, the contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged (Sec 136). As, for example, where C, the holder of an overdue bill of exchange drawn



by A, as surety for B and accepted by B, contracts with M to give time to B, A is not discharged; also mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety (Sec. 137). "Mere forbearance" here means that there is no express agreement to give time.

### Release of a Co-surety

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties (Sec. 138). The rule is opposed to that in English law because there a release or discharge granted to one of the co-sureties operates also as the discharge of the others. The second part of the section retains the right of contribution against co-sureties in case one of the sureties is called upon to pay up the whole debt and does so pay or where he pays more than his own true share of contribution as such a surety. This right of contribution can be enforced even when the surety did not know at the time of incurring liability that he was to be co-surety with others and also whether the sureties are joint or joint and several and whether instruments by which they are bound are the same or different as long as the engagement is the same with the same principal. In the absence of a special agreement, joint sureties contribute equally.

If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (Sec. 139); e.g. B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by the prepayment.

On the same principle, if the creditor returns the securities which he could realise and apply in discharge of his debts, the surety becomes exonerated to the extent of the value of such securities.

### Surety's Rights on Payment

When a surety pays what is due, or performs all that he is liable to perform where the guaranteed debt has fallen due, or the default of the principal debtor has taken place, he is invested with all the rights which the creditor had against the principal debtor (Sec. 140). In other words, the surety in such a case is subrogated in place of the creditor whom he pays out and becomes entitled to all the benefits and remedies the creditor was invested with against the principal debtor. Here he can recover the amount from the principal debtor with interest, and can claim the benefit of every security which the creditor had against the principal debtor at the time when the contract of

suretyship was entered into, and that too even if the surety did not know of the existence of such security (Sec. 141). Of course, here the surety must have paid the whole debt, because if he has only paid a part of it he cannot claim a proportional right in these securities. If what was guaranteed was only a part of the debt then he can claim, on paying up that part, a *pro rata* share in those securities.

The implied promise of the principal debtor in the contract of guarantee being to indemnify the surety, the surety can claim only the amount he has rightfully paid but not that which was paid wrongfully.

If, however, a guarantee has been obtained by misrepresentation or concealment of a material circumstance, the transaction is invalid (Secs. 142 & 143).

If the guarantee includes a contract that the creditor shall not act upon the guarantee until some other has joined in it as a co-surety, the guarantee will not be valid if that other person does not join (Sec. 144).

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, they are liable to pay, as between themselves, each an equal share of the whole debt or that part of it which remains unpaid by the principal debtor (Sec. 146). If they are bound in different sums, they are liable to pay equally as far as the respective obligations permit /

### **Promissory Notes and Bills in lieu of Guarantee**

The other method of guaranteeing without entering into an actual bond or agreement is to give a promissory note jointly and severally. Frequently a bill which is drawn and accepted is endorsed by a party, not because he is a party to the bill but because he acts in the capacity of a guarantor or surety. This form has one drawback, viz. that the banker will not here get the benefit of the protective clauses which a properly drawn guarantee form contains. In such forms the lender is allowed to present bills on the due date, if they are payable after the expiry of a specified period. He is here in the position of a holder in due course and in case of dishonour, he is bound to carry out all the duties of a holder in due course, whose bill has been dishonoured, i.e. in connection with noting, protest, giving notice of dishonour, etc.

## CHAPTER X

### NEGOTIABLE INSTRUMENTS

#### Negotiable Instruments

THE LAW with regard to bills of exchange, cheques and promissory notes in India is covered by the Indian Negotiable Instruments Act, 1881, and the sections quoted in this chapter refer to that Act.

#### DEFINITIONS

A *bill of exchange* is a negotiable instrument and is defined as "an instrument in writing containing an *unconditional* order, signed by the maker, directing a certain person to pay a *certain* sum of money only to, or to the order of, a *certain person*, or to the *bearer* of the instrument" (Sec. 5).

A *promissory note* is defined as "an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument" (Sec. 4).

A *cheque* is defined as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand" (Sec. 6).

#### PECULIARITIES

From the above definition of a bill of exchange, it would be noticed that the bill must be in writing. It must also be unconditional. With regard to the expression "unconditional" the Act says that the "promise or order to pay is not conditional within the meaning of Sections 4 and 5 by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event, which according to ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain." As, for example, if a bill is payable on the death of A, that event, according to the ordinary expectation of mankind, is certain to happen, and therefore, the bill would not be void on the ground of uncertainty. If, however, a bill is to be payable "on the marriage of A" it will be void on the ground that A might not marry at all. Another requirement is that it must be payable either on demand or at a determinable future time. The bill ought to be also for a sum certain. With regard to this the Act says that the sum payable is certain within the meaning of Sections 4 and 5 although it includes future interest, or is payable at an indicated rate of exchange, or is according to the course of exchange and although the instrument provides that on default of payment of an instalment

the balance unpaid shall become due. The definition also requires that the person to whom the bill is payable ought to be a specified person or that the bill should be payable to bearer. With regard to this the Act lays down that the person should be taken as specified although he is misnamed, or is designated by description only.

Our Negotiable Instruments Act clearly lays down that its provisions shall not apply to the Indian Paper Currency Act of 1882 and shall not affect any local usages relating to any instrument in an oriental language, except so far as such usages are excluded by any words in the body of the instrument or where the intention is indicated to the effect that the legal relations of the parties to a particular class of instrument shall be governed by the Negotiable Instruments Act (Sec. 1). It may be added, therefore, that this Act primarily deals with bills of exchange, promissory notes and cheques. There may be other kinds of negotiable instruments to which it would apply in the absence of legal usage to the contrary.

### **HISTORY**

This branch of law originally derived its authority from the Law Merchant which is an accumulation of the customs of trade which received the sanction of law through the decisions of judges. Cockburn, C. J., while speaking about the history of negotiable instruments in *Goodwin v Roberts*, (1875) L.R. 10, Ex. 337-46, expressed himself as follows —

“Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them generally found its way into France, and still later, but slowly, into England. With the development of British commerce the use of these most convenient instruments of commercial traffic would, of course, increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v Bourne*, (1603) Cro. Jac. 6, in the reign of James I. Up to this time the practice of making these bills negotiable by endorsement has been unknown, and the earlier bills are bound to be made payable to a man and his assigns, though in some instances to bearer. But about this period, i.e. at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by endorsement took its rise. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons whether traders or not.”

### **Forms (Promissory Notes and Inland and Foreign Bills)**

The simplest of these documents is a promissory note. Supposing that A borrows from B Rs. 100 or owes him that money, he may give

to B a promissory note, in which he promises to pay B Rs. 100 on demand, or at some other future date, with or without interest, according to arrangement between them. The simplest form would be as follows :—

<div style="border: 1px dashed black; width: 100px; height: 80px; margin: 0 auto;"></div> <p>Stamp</p>	<p style="text-align: right;">58, Hornby Road, Bombay, 10th June 1943.</p> <p>On demand (or at three months after date) I promise to pay Mr. B the sum of Rupees One Hundred only. Value received.</p> <p style="text-align: right;">(Sd.) A.</p> <p style="text-align: center;"><u>Rs. 100-0-0.</u></p>
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This instrument puts the debt in what is called a "tangible form", and B, the holder of it, has not only the consolation of having a written acknowledgment of this debt, as well as an instrument which evidences an indefensible acknowledgment of the debt, but also, in case he is in want of money and the debt is not due (where it is to be paid after some time), he can raise money on this promissory note by discounting it with a bank, i.e. selling it for its value less a charge made by the banker by way of discount, or transfer it to some other person to whom he (B) may be owing money. The other advantage is that bills of exchange can be used in settlement of debts and pass from hand to hand settling debts in succession as if they were a part of the currency of the country and are actually termed mercantile currency. For the purpose of remittances from one country to another, these instruments are very handy and are made use of largely.

With regard to a bill of exchange, it may be an inland or a foreign bill. We shall first take a simple example of an inland bill. A, a retailer, buys goods from B, a wholesale merchant, for, say Rs. 150. The arrangement is that A should have a credit for one month after the date of the delivery of the goods and that a bill should pass between them. Therefore, B, when delivering goods to A, presents an invoice for the goods he has sold and also a draft drawn on A. This draft would be known as the draft of B which has to be accepted by A and returned to B, which makes it a complete document. The draft as drawn would be in the following form :—

<div style="border: 1px dashed black; width: 100px; height: 80px; margin: 0 auto;"></div> <p>Stamp</p>	<p style="text-align: right;">58, Hornby Road, Bombay, 20th July 1943.</p> <p>One month after date pay to me or my order the sum of Rupees One Hundred and Fifty only, for value received.</p> <p style="text-align: right;">(Sd.) B.</p> <p style="text-align: center;"><u>Rs. 150-0-0.</u></p>
<p>To Mr. A.</p>	

The above draft, when accepted by A would bear across the face of it the following writing :—

**ACCEPTED.**

(Sd.) A.

*Bombay, 20th July 1943.*

The holder of this bill, i.e. B, can now hold it till its due date, viz. 23rd August (which includes three days of grace) and recover Rs. 150 on that date from A, the acceptor. If B likes he may indorse it over to any one in payment of any debt owing, or if he happens to be in want of money before maturity of this bill, he may discount it with his banker, as in the case of the promissory note dealt with above. It will thus be noticed that in this case, though A obtains goods on a month's credit, B obtains an instrument which renders almost the identical service that ready cash would have rendered, because he can either hold it on, or discount it and obtain cash, or use it in payment of his own debt to others.

In the case of foreign bills, i.e. bills drawn on firms and individuals outside the country, they are generally drawn in sets of three, each of which is called a '*via*' and as soon as any of them is paid, the others become inoperative. If, however, a person accepts or indorses different parts of a bill in favour of different persons he and the subsequent indorsers of each part are liable on such part as if it were a separate bill (Sec. 132). It must also be remembered that in case of the foreign instruments (except where there is a contract to the contrary) the liability of the maker, or drawer of a foreign promissory note, bill or cheque is regulated by the law of the place where he made the instrument and the liability of the acceptor and the indorser by the law of the place where the instrument is made payable. In case of dishonour of such an instrument, the law of the place of payment governs dishonour (Secs. 134 and 135). This is of course subject to a contract to the contrary. It is further provided that whereas a foreign instrument is made according to British Indian Law and is accepted or indorsed here the acceptance and indorsement are good though the instrument was not according to the law of its origin. They are drawn in a set so that they can be sent by different mails, or through different routes, to ensure at least one reaching its destination. We shall take the following as an example :—

<div style="border: 1px solid black; width: 100px; height: 80px; margin: 0 auto;"></div> <p>Stamp</p>	<p style="text-align: right;"><i>London, 21st July 1943.</i></p> <p>Sixty days after sight of this First of Exchange (second and third of the same tenor and date unpaid) pay to the order of Messrs. Lyon, Sons &amp; Co., Bombay, the sum of Rupees Two Hundred only. Value received.</p>
<p><u>Rs. 200-0-0.</u></p>	<p style="text-align: right;">(Sd.) Lyon, Sons &amp; Co.</p>
<p>To</p>	<p><b>Messrs. JAMESDJI &amp; FRANJI, BOMBAY.</b></p>

The second would read as—

<div style="border: 1px dashed black; width: 100px; height: 100px; margin: 0 auto; display: flex; align-items: center; justify-content: center;"> <div style="border: 1px solid black; width: 80px; height: 80px; margin: 5px;"></div> </div> <p style="text-align: center; margin-top: 5px;">Stamp</p>	<p style="text-align: right; margin-bottom: 10px;"><i>London, 21st July 1943.</i></p> <p>Sixty days after sight of this Second of Exchange (first and third of the same tenor and date unpaid) pay to the order of Messrs. Lyon, Sons &amp; Co., Bombay, the sum of Rupees Two Hundred only. Value received.</p> <p style="margin-top: 20px;">Rs 200-0-0.</p> <p style="text-align: right; margin-top: 10px;">(Sd.) Lyon, Sons &amp; Co.</p> <p>To</p> <p style="text-align: center;">MESSRS. JAMSHEDJI &amp; FRAMJI, BOMBAY.</p>
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An inland bill or instrument is defined as "a promissory note, bill of exchange or cheque drawn or made in British India and made payable in or drawn upon any person resident in British India" (Sec. 11), whereas a foreign bill or instrument is defined as "any such instrument not so drawn, made or made payable" (Sec. 12).

### CONSIDERATION

Negotiable instruments are presumed to stand on the basis of valuable consideration. The rules as to consideration are the same as those laid down by the contract law except where the same is opposed to the provisions of this Act. According to Section 43, "a negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to the holder for consideration, such holder and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto." Thus where a bill is drawn by A and accepted by B without consideration as between A and B, the want of consideration will be a good defence. If, however, A, the drawer, transfers the bill to C for a valuable consideration and C presents on the due date to the acceptor B, the original absence of consideration as between A and B cannot be urged against C by B as a defence. (*Sakaram Mansaram v. Gulabchand Tarachand*, 16 Bom. L.R. 743.) The consideration must also be lawful, otherwise the bill cannot be enforced between immediate parties. With regard to remote parties also it will invalidate the bill unless the holder is a *bona fide* holder in due course. The exception being that in the case of an accommodation bill the party accommodated cannot recover the amount paid by him from one who accommodated him; e.g. A draws a bill at the request of B on B and B accepts it. A then discounts the bill and hands over the proceeds to B for whose accommodation and to favour whom he had drawn

this bill. The bill on due date is presented for payment to B, and B pays. B has no claim or right to insist on A making good the amount. On the same principle, an indorsement on a bill is presumed to have been made for valuable consideration. If it was not so made in fact the bill is not enforceable as between the parties immediately concerned, but it does not affect the rights of an innocent holder in due course. Supposing A indorses a bill over to B without consideration and B indorses it to C for a valuable consideration and if it is dishonoured by the acceptor and drawer who are insolvents, C can recover the amount from B but B cannot recover it from A.

Of course, in case of every negotiable instrument the presumption, until the contrary is proved, exists that it was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration (Sec. 118). This presumption may be rebutted by showing that the instrument was obtained from its lawful owner by means of fraud or an offence or that no consideration was given. As the consideration here is presumed the party denying it has to prove his case. This of course applies to instruments which are negotiable.

It is the usual practice to insert the words "value received" or a similar statement of consideration in bills of exchange and promissory notes though in law they are not necessary. It may be added that a person who holds a bill of exchange for collection with a lien on the bill is a holder of the bill for consideration. (*Royal Bank of Scotland v. Rahim Cassim & Son*, 27 Bom. L.R. 506.)

## NEGOTIABLE INSTRUMENTS

(1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

*Explanation (i)* A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

*Explanation (ii)* A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or in which the only or last indorsement is an indorsement in blank.

*Explanation (iii)* Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of the specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or more of several payees.

Judge Willis, in his work on Negotiable Instruments, defines a negotiable instrument as "one, the property in which is acquired by any one who takes it *bona fide*, and for value notwithstanding any



defect in title of the person from whom he took it." It would thus be seen that by "negotiability" is meant that not only is the instrument transferable by indorsement or delivery, but that, apart from its transfer, the holder in due course of a bill, who has received it *bona fide* complete and regular on the face of it, before it was overdue, for value, and without any notice as to the defect in title of a previous holder, acquires a good title, notwithstanding any defect in a previous holder's title. With regard to a *bona fide* taking of the bill the fact that he paid full value for it will go a long way to prove it, whereas if much less than the actual amount of the bill is paid it will throw some doubt as to *bona fide* taking. In one case, where a money-changer took a bank note for full value, giving actual cash for it, twelve months after he had received notice of a robbery, it was held that the circumstances of his forgetting or omitting to look for the notice was no evidence of *mala fides*. (*Raphael v. The Bank of England*, 17 C.B. 171.) It may also be added that "a promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at the place" (Sec. 68)

The holder in due course of a negotiable instrument means "any person, who, for a consideration, becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to, or to the order of the payee, before the amount mentioned in it becomes payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title" (Sec. 9).

It will be seen from the above definition that the holder should have become the possessor of the document "before the amount mentioned in it becomes payable" and thus if a person takes the document after it has already fallen due, he will not be called a "holder in due course." Further, he should take the instrument "without having sufficient cause to believe that any defect existed." In English law if it could be proved that the holder took the document "in good faith" it would be sufficient, but in India under this section more than mere "good faith" is necessary and therefore it would not be sufficient to show that he acquired the document honestly but was a little negligent. It should also be remembered that even a holder in due course cannot get a good title if a previous endorsement was forged.

The expression "or order" has, as far as bills of exchange are concerned, a peculiar meaning and must, as far as possible, be strictly used in cases of instruments written in the English language, because doubt is thrown as to whether the use of other words would be construed as having a similar effect.

The use of the words "or assigns", "or agent", "or attorney", "or representatives" would not be construed as having the same effect as the words "or order".

An instrument drawn as "Pay A only" is not negotiable. Again,

where the indorsement on an instrument runs as "Pay A" and does not include the words "or order" or "or bearer" the bill is negotiable in spite of this omission. The same rules apply to Government promissory notes, as under the Indian Securities Act of 1886, Sec. 6, the Negotiable Instruments Act is applicable to them. (*Hunsraj v. Ruttonji and Walji*, 24 Bom. 15.) In this case Government promissory notes had been stolen, indorsements forged thereon and sold. When the rightful owners claimed them from the holders it was found that some of the loans were renewed. The court held that forgery gave no title and that Government promissory notes came under the Negotiable Instruments Act and that the plaintiffs should hand back all the notes, including those renewed.

From what has been so far discussed it must not be thought that bills, promissory notes and cheques are the only negotiable instruments. Other instruments, besides these three may be, and in actual practice are, enjoying the privilege of being "negotiable" by the custom and usages of trades and markets. Each case will be decided on its own merits. In other words, though our Negotiable Instruments Act no doubt deals only with bills, promissory notes and cheques, it by no means seeks to limit the number of negotiable instruments to these three documents; the Law Merchant, as interpreted by the courts, is left entirely a free hand in the work of extending the privilege to other instruments.

### "Not Negotiable" Crossing

If a cheque is crossed generally or specially, bearing the words "not negotiable", it shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he received it had. Such a cheque may be indorsed and negotiated, but no subsequent holder receives a better title than the transferor whether he is an innocent holder in due course or not. This is generally done when the holder wishes to transmit the cheque or bill by post, or through some other medium by way of remittance, and wishes to protect himself from the risk of having to pay twice over in case it is stolen on the route, and gets in the possession of some one who may be in a position to claim money on it as a "holder in due course for value".

## PARTIES

### Capacity

The capacity of a party to draw, accept, make or indorse a bill or a note is co-extensive with his capacity to enter into a contract. However, the peculiarity of the bill is that incapacity of any one party to the bill in no way diminishes the liability of others. Thus a minor cannot incur liabilities on a bill by either drawing, accepting or indorsing it, but others of full age who are parties to the bill, are liable.

Majority in India is determined by the law of domicile. Under the Indian Majority Act of 1875, every person domiciled in British India attains his majority at the age of 18, but if before his attaining this age, a guardian of his person and property was appointed by a Court or the supervision of his property had been taken up by a Court of Wards, the period of majority would be extended to the age of 21. The capacity of a person of unsound mind, or a lunatic, to incur liability on a bill of exchange is the same as his capacity to contract, as we have discussed in the chapter on Contracts. An agent duly authorized may make out, accept or indorse a cheque, bill or note in the name of his principal and thus bind the latter. If the agent signs in his own name he will be personally liable.

The capacity of corporations and companies to incur liability on bills of exchange depends upon their constitution and nature of business.

### Parties to a Bill of Exchange

(1) The *drawer* is the person who draws the bill. He is known as the *maker* in the case of a promissory note.

(2) The *drawee* is the person on whom the bill is drawn. He becomes the *acceptor* after he has signified his assent to the order of the drawer by writing the word "accepted" right across the face of the bill with his signature and date.

(3) The *payee* is the person to whom the bill is made payable. The drawer may make the bill payable to himself or may name another person in the bill to whom it has to be paid.

(4) The *holder* of the bill may be the original payee named in the bill, or one to whom the bill is indorsed over by the original payee. In the case of a bill or a promissory note payable to bearer, the bearer is the holder.

(5) When the payee indorses the bill he is also known as the *indorser* and the person to whom it is indorsed is the *indorsee*. Indorsements are of various kinds, as we shall see later (Sec. 7).

### ACCEPTANCE

An acceptance is the assent by the drawee to the order of the drawer which assent is expressed by him in writing on the bill with his signature with or without the word "accepted". Delivery after acceptance is necessary to complete it.

A bill should be presented to the drawee for acceptance because until he accepts he is not personally bound to pay. In the case of (1) a bill payable after sight, or where (2) the instrument itself stipulates that it should be presented for acceptance, or where (3) the same is payable elsewhere than the place of business or residence of the drawee, the same must be presented for acceptance. The Act requires the assent to be written on the bill and therefore an acceptance on a copy or a separate paper will not do. We have seen that a bill must be

delivered after acceptance and on the same principle the bill must be delivered after being endorsed to make the property pass (Sec. 46). Sending a cheque after being endorsed through the post is delivery. (*Jaggiwandas v. Nagar Central Bank*, 28 Bom. L.R. 226.) The delivery may be either actual or constructive. A constructive delivery arises where after acceptance the acceptor writes to the holder informing him of his having accepted the bill. *Hundis* may, on the contrary, be accepted orally by local custom. When the bill is presented to the drawee for acceptance the presenter must leave it with the drawee for consideration for twenty four hours if the drawee so desires (Sec. 63). In the case of bills payable after sight, presentment for acceptance is necessary in order to fix the maturity of the bill (Sec. 61). The same rule applies to promissory notes payable after sight (Sec. 62).

### Acceptance by Agent

A bill may be accepted by the drawee's agent on the latter's behalf but the agent so accepting must make that point clear, or else he may be personally liable. A bill signed by directors or agents of a company must make it clear that they sign on behalf of the company as its agents.

We shall now proceed to discuss the various peculiarities as to "acceptance". The "acceptance" may be *general* or *qualified*.

### General Acceptance

A *general acceptance* is where the drawee signs his name on the bill with or without the word "accepted", thereby signifying his assent to the bill. The signature of the drawee, even though it was placed on the back of the bill, was held to constitute an acceptance [*Young v. Glover*, (1857) 33 Jur. (N.S.) 637.]

The acceptance must not state that the drawee is to fulfil his obligation in any other consideration than a payment of money. [*Russell v. Phillips*, (1850) 14 Q.B. 891.] As a general rule the bill must always be accepted generally, and if the acceptor adds any qualification to it, it becomes a conditional acceptance, as we shall see later, in which case the drawer may either agree to such an acceptance or treat the bill as dishonoured for non-acceptance.

### Qualified Acceptance

An acceptance may be *qualified* in various ways. It may be qualified *as to the amount*, e.g. a bill may have been drawn for Rs. 500, whereas the acceptor, perhaps arguing that he owes only Rs. 300, may accept for Rs. 300, as "Accepted for Rs. 300 (three hundred) only".

It may be *qualified as to time*, e.g. where a bill is drawn payable one month after date, the drawee accepts it as "Accepted payable three months after date".

It may be *qualified as to place* and made payable at a particular place, and there only, as "Accepted payable at the Lloyds Bank and there only". If, however, the acceptance is worded as "Accepted payable at the Bank of India, Ltd.", it is not qualified, because here the holder is not bound to present same at the bank and may present it for payment at the acceptor's place of business.

It may be accepted as *payable in instalments*, as "Accepted payable in monthly instalments of Rs. 50".

It may be *conditional* as "Accepted payable when in funds", or "Accepted payable when goods consigned are sold".

It may be *partial* as when a bill is drawn for Rs. 3,000 and is accepted for Rs. 1,000.

The drawer or holder of a bill is not bound to agree to an acceptance which is qualified. He can treat the bill as dishonoured, and move for remedies open to him on that ground. If, however, the holder of such a qualified acceptance acquiesces in the qualified acceptance, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him (Sec. 86). This is because the drawer and endorser are in the position of sureties for the acceptor and the surety, as we saw in the previous chapter, is released from his liability for any alteration in the terms without his assent. The English Bills of Exchange Act further lays down that if after notice the drawer or endorser does not express his dissent within a reasonable time, he shall be deemed to have assented. If the acceptor wishes to qualify his acceptance he should do so in the "clearest language" so that any person who sees it may not have the slightest doubt as to the nature of the acceptance.

### Liability of Acceptor or Maker

With regard to the liability of the maker of a promissory note or the acceptor of a bill, Section 32 says as follows:

In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

It will be seen here that the maker of a promissory note is bound to pay according to its tenor mainly because he has signed it and bound himself thereby. In the case of a bill of exchange, however, the drawee is not bound on it either to the payee mentioned in it or to a holder unless and until he accepts it. If the drawee refuses to accept, the only remedy open to the payee or holder is to sue the drawer or the previous indorser.

No person except the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance (Sec. 33). Where there are several drawees of a bill of exchange who are not partners each of them can accept it for himself, but none of them can accept it for another without his authority (Sec. 34).

The acceptor is defined by Section 7 as -

After the drawee of a bill has signed his assent upon the bill or, if there are more parts thereof than one, upon one of such parts, and delivered the same or given notice of such signing to the holder or to some person on his behalf, he is called the 'acceptor'.

## INDORSEMENTS

### Definition

An indorsement is defined as

When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker for the purpose of negotiation, on the back or face thereof, or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument he is said to indorse the same, and is called the 'indorser' (Section 15)

It will here be seen that the indorsements, though they are usually written on the back of a document, may be on the face or on a separate paper attached to the instrument. It is, of course, desirable that the indorsement be in ink though one in pencil is not bad and has been held as within the custom of merchants in England (*Gibb v. Payne*, 5 B. & C. 284).

### Effect of an Indorsement

When a negotiable instrument is indorsed and delivered to the indorsee, the property therein together with the right of further negotiation, passes to the indorsee. But it is quite open to the indorser to restrict or exclude such right, or merely to constitute the indorsee an agent to indorse the instrument for some other specified person (Sec. 30). Thus when the indorsements are placed as "Pay the contents to C only", or "Pay C for my use", or "Pay C or order for account of B", or "The within must be credited to C"; the indorsements exclude the right to further negotiate.

An indorsement is not bad simply because besides the statement transferring the instrument it adds a statement as to the payment of consideration, e.g. "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to me" [ill. (g), Sec. 50].

In case a person who is not a party to the bill indorses it, he is in the position of a surety or guarantor to all subsequent holders.

With regard to the indorser, his position is that, unless he

excludes his liability by making it *sans recours*, as we shall see later, he is bound to make good to every subsequent holder for value, in case of dishonour, the loss or damage caused to such subsequent holder through such a dishonour by either the drawer, acceptor, or maker. This is, of course, subject to the condition that the holder has done all he is bound to do as to presentment, and notice of dishonour; such liability of the indorser shall be payable on demand as soon as it accrues (Sec. 35). Thus indorsers are in the position of sureties to all subsequent parties for the prior indorsers and the acceptor and maker who are principal debtors (Secs. 37 & 38).

An indorsement by a rubber impression or in any other form of the facsimile signature is valid at law, if placed by the person whose signature it purports to be or through his authority.

*Indorsee* is the person to whom the bill is indorsed, i.e. the person specified to receive the amount mentioned in the instrument (Sec. 54).

#### Indorsement by a Person Deceased

In the case of a negotiable instrument payable to order which has not been indorsed by the person deceased, or which has been indorsed by the deceased but who died before delivery, the same cannot be negotiated by delivery by his legal representative (Sec. 57). If X, in whose favour a bill is drawn, indorses it and dies before delivering it, his executors or administrators cannot negotiate it on the indorsement of the deceased but should re-indorse it themselves in their legal capacity of executors or administrators.

#### Indorsement of a Lost Instrument or One Obtained by Fraud

Again, when a negotiable instrument has been lost or has been obtained from any maker, acceptor, or holder, by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found it or obtained it by such unlawful means is entitled to receive the amount due thereon from the maker, acceptor, holder or any party, prior to such holder, unless such a holder was the holder thereof in due course (Sec. 58).

Under this section would fall instruments obtained by theft, forgery, fraud, and unlawful consideration. In the case of stolen instruments the thief, of course, gets no title and cannot enforce it against parties to it, but if the instrument happens to be payable to bearer, or indorsed in blank by a rightful holder, and the thief delivers it to an innocent holder in due course for value, the said holder gets a good title and will be protected. If, however, the instrument is payable to order and the thief forges the indorsement of the payee and then delivers it to some one for valuable consideration, the transferee will not be able to enforce payment from the parties to the bill, and in case he has obtained payment by some

inadvertence it can be reclaimed from him. This is because of the rule, viz. "forgery gives no title" and this rule applies equally to a transferee for value of a bill of exchange as to the transferee of any other document. (*Thorpha v. Umedmalji*, 25 Bom. L.R. 603.) The plea of fraud is good only against the party who is guilty of it or against his transferee who knew of the fraud when he took it. It will not affect the rights of a holder in due course. The same rule applies to instruments obtained for an unlawful consideration.

### **Transferee after Maturity or Dishonour**

The holder of a negotiable instrument who has acquired it after dishonour, whether by non-acceptance or by non-payment, with notice thereof, or after maturity, has only as against the other parties, the right of his transferor (Sec. 59).

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it is not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds, but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

It will thus be seen here that a transferee who takes a bill after the date of maturity, even though he does so for a valuable consideration, is not a holder in due course. The same rule applies to one who takes it after it is dishonoured, provided he has notice of dishonour.

This does not mean that a negotiable instrument cannot be negotiated or transferred after maturity. Section 60 clearly lays down that it can be transferred or negotiated—except by the maker, drawer or acceptor after maturity—any number of times after the due date of payment. Its negotiability terminates on payment or discharge of this document at maturity or after it. If the same is paid before maturity it can still be negotiated by the person who paid for it, as the payment is not made in due course according to law in such a case.

If a bill is made payable to more than one payee they must all indorse unless they are partners in a trading firm, when one of the indorsees can sign on behalf of all. When the payee's name is wrongly spelt the indorsement should be in the same spelling as in the instrument, but the payee may add thereafter his correct signature.

### **DIFFERENT CLASSES OF INDORSEMENTS**

The indorsement may be—

(1) *Blank*, i.e. only a signature.

If the instrument is indorsed in blank it will be payable to the holder thereof even though originally payable to order (Sec. 16).



A blank indorsement is effected by the holder writing his signature on the document. This makes the instrument transferable by delivery and equivalent to "payable to bearer" (Sec. 16).

An instrument which bears a blank indorsement may be afterwards indorsed in full by the holder and in that case the amount of it cannot be claimed from the indorser except by the person to whom it has been indorsed in full or by one who derives title through such person (Sec. 55).

Here the position is that where an instrument indorsed in blank in the first instance is afterwards indorsed specially, the bill remains transferable by delivery in connection with all parties prior to the special indorsement, but with regard to the special indorsement the person to whose order it is indorsed should indorse it to give it further negotiation, e.g. in *Walker v. Macdonald*, (1848) 2 Ex. 527, a bill was first indorsed in blank and afterwards indorsed by the defendant specifically to "Barber and Walker & Co.". The plaintiffs, who carried on business both as "Barber and Walker & Co." as well as "Eastwood Company", indorsed it as "Eastwood Company". The bill was dishonoured on presentation as it was not indorsed by "Barber and Walker & Co.". It was held that the bill being indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement, and that the presentment was such as to render the defendant liable on his indorsement to the plaintiff.

(2) *Special or Full*, is made up of the name of the party to whom the bill is indorsed with the signature of the indorser, e.g.

Pay to John Smith or order.  
(Sd.) WILLIAM GREEN.

(3) *Partial*, e.g. where only a part of the amount of the bill is transferred. This does not operate as a negotiation of the instrument; but may authorize the indorsee to receive payment of the amount specified. The law lays down that an indorsement must relate to the whole instrument (Sec. 56).

(4) *Restrictive*, i.e. (a) where it prohibits further negotiation, as "Pay to M only", or (b) restricts the indorsee to deal with the bill as directed by the indorser, as "Pay to M or order for collection" (Sec. 50).

(5) *Sans recours*, i.e. where the indorser makes it clear that the indorsee or subsequent holders should not look to him for payment in case of dishonour; e.g. if A indorses a bill *sans recours* to B, and if B agrees to take it with such an indorsement, he takes it with the understanding that in case he (B) fails to recover money from the acceptor, or any of the previous indorsers to A, he (B) cannot sue A on the bill (Sec. 52); or

(6) *Conditional*, i.e. here some condition is attached to the indorsement. As per English law the person paying may ignore the condition, but in India if an acceptor accepts a bill after it was

conditionally indorsed, he should respect the condition. There is no decided case on the point and the question, according to Chalmers, may be regarded as an open one.

(7) *Facultative*, i.e. the indorsement waives some of the holder's duties towards the indorser, e.g. "notice of dishonour waived". Here a subsequent party need not give him such a notice.

(8) *Sans frais*, i.e. the endorser does not want any expense to be incurred on his account on the bill.

### SIGNATURE

It is necessary that the drawing, accepting and indorsing of a negotiable instrument should be made through the signatures of the drawer, acceptor and the indorser. The signature may be in any form so long as it indicates the intention and the identity of the person who signs. If the signature is misspelt or not placed in the usual form that will not of itself invalidate the instrument. [*Leonard v. Wilson*, (1834) 2 Cr. & M. 589.]

The signature or the indorsement on a bill is the name of the party so placing his signature or that of the firm which he represents with proper authority. The law says that in case of a partnership, a bill or a note can be drawn, accepted, and indorsed, in the regular course of the business of partnership, by any of the partners in the firm's name, or if the partnership agreement specially provides, by the partner who has charge and management of the firm under this agreement. The manager of a firm or company may draw, accept, and indorse bills of exchange in the regular course of the business of the firm, whereas a manager or assistant holding a power-of-attorney would sign as—

*per pro* Smith & Co.,  
JOHN ROBINSON.

A manager, agent or secretary of a company would sign as—

For The Lending and Borrowing Corporation, Ltd.,  
L. RAJARAM,  
Manager.

If, on the contrary, L. Rajaram signs as—

L. RAJARAM,  
Manager.

*The Lending and Borrowing Corporation, Ltd.*

the signature will not be reckoned as one by the manager of the company on its behalf, but will be considered at law as the personal signature of L. Rajaram. It must also be borne in mind that in cases of *per pro* signatures it is clear that the person placing such a signature claims his authority to sign under a power-of-attorney. This power-of-attorney may be either very limited or very wide and general, and, therefore, before accepting this type of signature on any important document, or on a bill for a large amount, care should

be taken to inspect the power with a view to ascertain whether the signature on such a document falls within the scope of the authority of the person signing. It must also be noted that if John Smith holds a power-of-attorney from the firm of, say, Messrs. Ralli Bros., and if he happens to have granted a power-of-attorney to his friend Thomas Williams, Williams cannot sign for Ralli Bros., and therefore, a signature such as the following should not be accepted:—

Ralli Bros.,  
per pro John Smith,  
**THOMAS WILLIAMS.**

On the same principle, directors of a company when they sign ought to sign as—

For The Lending and Borrowing Corporation, Ltd.,  
**HIRJI NATHOO,**  
**HAROON KHALIL,**  
*Directors.*

But if they sign as—

**HIRJI NATHOO,**  
**HAROON KHALIL,**  
*Directors.*

*The Lending and Borrowing Corporation, Ltd.*

the signature would bind them personally, and would not be considered as their signatures on behalf of the company.

The signature on a bill or note may be by a mark, as we have seen above, provided there is evidence to prove that the person signing by mark, habitually signs in that fashion.

A private individual can sign through a duly authorized agent on the same footing as a corporation or a joint-stock company. Here the agent may either sign the name of the principal without adding his own name or stating that he acts for him, or the agent may sign his own name and then make it clear that he signs for the principal named. An authority to draw a bill will not necessarily imply an authority to indorse. Again, an authority to transact business and to receive and discharge debts does not by itself confer a power to accept or indorse bills of exchange (Sec. 27). If, however, the agent signs his own name only and does not indicate that he signs for his principal he will be personally liable on the instrument to all except those who induced him to sign upon the belief that the principal only will be liable (Sec. 28). If a person purports to sign for another without authority, the signature will be as inoperative as a forgery. (*Bank of Bengal v. Macleod*, 5 I.A. 1.) But where an agent signs in excess of authority a holder in due course will be protected.

### **Forgery**

Forgery is a signature placed without authority and with a fraudulent intention. Such a signature is wholly inoperative on the bill as well as on any other instrument. As we have already seen, even a holder in due course of a bill of exchange cannot derive any title under a forgery. In short "forgery gives no title" is a rule well established.

### **PRESENTMENT FOR ACCEPTANCE**

A bill of exchange payable after sight must be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance within a reasonable time after it is drawn, and during business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place. If no particular place is mentioned it must be presented at his usual place of business, if any, or at his residence. If at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured. When authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient (Sec. 61).

The necessity of presentment for acceptance lies in the fact that here the holder is in a stronger position. Before acceptance he was in a position to enforce payment from the drawer and the prior indorsers in case the drawee failed to pay, but he cannot enforce payment from the drawee who has not accepted because in law no person who has not signed the bill himself or through a duly empowered agent can be made liable on it. The holder thus is under no legal obligation either to the drawee or drawer or indorser (unless he has specifically agreed to do so) to present the bill for acceptance, as he is to present it on due date for payment, except in the case of a bill payable after sight. To put it briefly, the presentment for payment, though not obligatory, is desirable, being in the interest of the holder. If the drawee has died the presentment may be made to his legal representative and where he is insolvent to his assignee (Sec. 75).

### **PRESENTMENT FOR PAYMENT**

A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and during business hours on a

business day. In default of such presentment, no party thereto is liable thereon to the person making such default (Sec. 62).

The holder of a bill must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it (Sec. 63). This section is based on the English Common Law rule.

Promissory notes, bills of exchange, and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment the other parties thereto are not liable thereon to such holder (Sec. 64). Here of course the acceptor still remains liable unless otherwise provided in the instrument itself as we have already seen. The same rule applies to *hundies* if they are not presented for payment on due dates, i.e. the acceptor remains liable. (*Benares Bank, Ltd. v. Hormusji Pestonji*, (1930) 52 All. 696.)

The presentment must be made during the usual hours of business, and if at a banker's, during banking hours (Sec. 65). In English law, in the case of a non-trader the presentment is required to be made at any time before the hours of rest in the evening but this does not apply to India. Where the presentment is made at an unreasonable hour but payment is refused on some other ground, the bill is taken to be duly and properly presented.

A promissory note or a bill of exchange made payable at a specified time must be presented for payment on maturity. If the presentment is not made on the due date, all parties except the maker, acceptor or drawee are discharged (Sec. 66). It was held in *Jhandu Lal Mithulal v. Wilayati Begum*, (1925) 47 All. 572, that no presentment for payment is valid unless it is made after the bill has reached maturity.

If the holder of a bill of exchange allows the drawee more than twenty-four hours (exclusive of public holidays), all previous parties including the drawer not consenting to such allowance are discharged from liability to such holder.

In case where a promissory note is payable at a certain period after sight the same should be presented to the maker thereof for sight by a person entitled to demand payment within a reasonable time after it is made and in case of default no party thereto is liable to the person making such default (Sec. 62).

If a promissory note is made payable by instalments it must be presented for payment on the third day after the date fixed for payment of each instalment, failing which it will have the same effect as non-payment of a note at maturity (Sec. 67).

If the instrument is made payable at a specified place it must be presented for payment at that place in order to make the maker or drawer liable thereon or where it is not made payable at any specified place, it must be presented for payment at the place of business,

if any, or at the residence of the maker, drawee or acceptor as the case may be, but if the acceptor or drawee or maker has no known place of business or fixed residence and no place is specified in the indorsement, the presentment may be made to him wherever found (Sec. 71).

To summarise as to presentment for payment:—

- (1) When the bill is payable on demand the presentment must be made within a reasonable time.
- (2) If payable after the expiry of some time it must be presented on the due date.
- (3) It must be made at a reasonable hour and place.
- (4) If made at a proper time and place and no person is found no further presentment need be made.
- (5) If the acceptor is dead it should be presented to his legal personal representative.
- (6) If there are two or more acceptors who are not partners it should be presented to all.

### **Bills Retired and Rebate**

A bill is said to be retired when it is paid before its due date. Here if the acceptor of a bill left with a banker for collection offers payment to the banker less interest for the balance of days, he should consult his customer before taking the payment. Frequently, "rebate" is allowed on bills retired with the consent of the holder which is an allowance made to the acceptor for early payment. There is one other meaning of the word "rebate". In case of bills discounted by a banker at the accounts closing period, the balance of discount, which is not earned during the year for bills not yet due, is carried over to the next year and is called in the accounts "Rebate on bills discounted".

### **CHEQUES**

A cheque is defined as: "A cheque is a Bill of Exchange drawn on a specific Banker and not expressed to be payable otherwise than on demand." Thus it will be noticed that if a bill payable on demand either to bearer or order is drawn on a specified Banker, it is a cheque both under the definition of Negotiable Instruments Act, Section 6, and the English Bills of Exchange Act, Section 73. It is stated to be a mandate or command on the Banker from his customer, which mandate must be obeyed strictly according to its terms so long as there is sufficient money to the credit of the customer. Where the Banker by some negligence dishonours the cheque, which is regular in all other respects, in spite of there being sufficient credit to his customer's account, he is liable to be sued for damages by his customer on the ground that the customer's credit is thereby impaired. The damages will be substantial in case the customer is a businessman or merchant and the principle will be "Smaller the cheque greater the

damage". The other point which is important in connection with a cheque is that the person who hands the cheque must present it for payment within a reasonable time from the date of its issue, and if through non-presentment within such reasonable time the bank on which the cheque is drawn fails to pay, the holder cannot sue and recover the amount of the cheque from the drawer and his only remedy will be against the liquidator of the Bank as its unsecured creditor.

It may be, however, noted that the bank's authority to pay the cheque is terminated if (1) the customer countermands payment, or (2) it hears of the customer's death, or (3) if a receiving order is made against the customer in the Bankruptcy Court of England, or an Adjudication Order of our Insolvency Court.

#### **Difference Between Cheques and Bills of Exchange**

The following may be summed as the main differences between a cheque and a Bill of Exchange:—

- (1) A cheque must always be payable on demand and drawn on a bank.
- (2) Cheques are not entitled to any days of grace as Bills of Exchange are in case they are payable at the expiry of a period stated in the bill.
- (3) Cheques are not required to be accepted, whereas bills of exchange require acceptance.
- (4) It is not necessary that the holder should give notice of dishonour of the cheque to the drawer as is compulsory in case of bills of exchange.

#### **Presentation of a Cheque**

A cheque must be presented to the banker upon whom it is drawn within a reasonable time after delivery thereof by such person (Sec. 73). If not so presented and the relations between the drawer and his banker have been altered to the prejudice of the drawer, the drawer would be discharged. The drawer would be discharged if the drawer suffers actual damage through the delay to an extent equal to or greater than the amount of the cheque. What is a reasonable time would be determined having regard to the nature of the instrument, the usage of traders and bankers, and to the facts of the particular case [Sec. 84 (2)]. The holder of a cheque, however, as to which such drawer or person is discharged would have the right to stand as the creditor of the banker in lieu of the drawer to the extent of the amount to the cheque for which the drawer was discharged; e.g. A draws a cheque for Rs. 1,000 in favour of B on a bank. A has sufficient funds at the bank to meet it when the cheque ought to be presented. The holder does not present it within a reasonable time and the bank fails. The drawer is discharged but the holder can prove against the bank for the amount of the cheque. If, on the other hand, A had not sufficient funds to meet the cheque he would

no be discharged but would have to pay the full amount of the cheque minus the damage suffered by him through the failure of the bank (Secs. 72 and 84).

It will thus be seen that as far as the drawer is concerned the holder must present the cheque within a reasonable time of the drawer's issuing it. If, therefore, the payee to whom the cheque is originally issued, or an indorsee to whom it is given in the regular course, keeps it for an unreasonable time and then gives it to some holder for value, such a holder, in case the cheque is dishonoured through the failure of the banker, can recover the amount from his immediately prior holder (in case, of course, he has presented it within a reasonable time of its receipt) but he cannot recover from the original drawer. What is a reasonable time depends, as we have seen, on the usage of bankers. A cheque is meant to be cashed immediately or within a reasonable time of its receipt and is not meant for circulation. In England, according to the custom of English bankers, ten days is taken to be the period within which a cheque ought to be cashed. Any other negotiable instrument which is also payable on demand, should be presented for payment within 3 reasonable time.

### **Bearer Cheques**

Under the Negotiable Instruments (Amendment) Act of 1934 it is provided that when a cheque is drawn as a bearer cheque it will always remain a bearer cheque notwithstanding any indorsement appearing thereon. It should be noted that this provision in the Section does not apply to bills of exchange, other than cheques. The law with regard to bearer cheques has been thus brought into line with that prevailing in England. Sub-section 2 of Section 85 which is added by this Amending Act of 1934 reads as follows:—

“Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any indorsement whether in full or blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or to exclude further negotiation.”

Where the cheque, however, is payable to order, it requires to be indorsed by or on behalf of the payee before the payment in due course of such a cheque can discharge the drawee banker.

### **CROSSED CHEQUES**

A crossed cheque is a cheque across the face of which two parallel lines are drawn with or without the words “and Co.” or any abbreviation thereof or some other words the effect of which is that the banker on whom it is drawn shall not pay it otherwise than to a banker. A cheque may be crossed generally or specially.

When a cheque is crossed generally it bears two parallel lines



without any words or with the words "and Co." or its abbreviation (Sec. 123).

A cheque is, on the other hand, said to be crossed specially where it bears across its face an addition of the name of a banker, either with or without the words "not negotiable" (Sec. 124).

When a cheque as originally issued is uncrossed, it is permissible to the holder to cross it generally or specially. He can add the words "not negotiable" to the crossing. Where a cheque is crossed specially, the banker to whom it is so crossed may again cross it specially to another banker or his agent for collection. In the case of these crossed cheques, it is the duty of the paying banker to see that the cheque is paid only to a banker; otherwise he will not be deemed to have made the payment in due course. Where a banker makes such an irregular payment, i.e. pays a crossed cheque to a person other than a banker, or where it is crossed specially to a banker, pays it to some one other than the banker mentioned in the crossing, he will be responsible to the drawer for any loss the drawer may sustain. On the same principle, if the banker receives payment of a crossed cheque on behalf of a customer in good faith and without negligence in the regular course of business, he shall not incur any liability to the true owner of the cheque in case the holder's title to the cheque proves defective. If, however, the crossing is obliterated, or is of a nature which cannot be noticed and the banker pays the same in good faith, he will also be protected. If a cheque is crossed to two different branches of a bank it would be considered as a crossing to a single bank, as the branches of a bank do not constitute two separate or distinct banks. It may also be noted that when a cheque is crossed generally, it may be altered to a special crossing but a special crossing cannot either be altered or be made a general crossing without the consent and the signature of the drawer (Secs. 55 and 123-31).

### **"Not Negotiable" Crossing**

In the case of cheques crossed "generally" or "specially", and bearing in either case the words "not negotiable", their position would be that such instruments shall not have, and shall not be capable of giving, a better title to the holder than that which the person from whom they were taken had (Sec. 130). The effect of a "not negotiable" crossing is to deprive the instrument of the special advantage which a negotiable instrument as such enjoys. The special advantage is, as we have seen, that the holder in due course of a negotiable instrument who receives it in good faith complete and regular on the face of it and without any notice as to any defect in title of a previous holder receives it free from all defences that may be had against a previous holder or the drawer, as to a defect in title of the instrument. The "not negotiable" crossing of an instrument is often misunderstood; people believe that the holder of it cannot transfer it to any party and that such an instrument is payable to the

holder alone which is far from being the case. An instrument crossed "not negotiable" may be indorsed any number of times as far as its transferability is concerned. Lord Halsbury, in *Laws of England*, says that "the effect of adding the words 'not negotiable' to a cheque is not to impede transfer, but to perpetuate in the hands of any transferee whatever defect or infirmity of title may affect the person who first transferred the cheque with those words on it."

### MARKING OF CHEQUES

With regard to the marking of cheques the question may be discussed from three standpoints, viz. (1) the marking at the instance of the customer, (2) the marking as between bankers, (3) the marking at the instance of a holder.

Lord Halsbury, in *Laws of England*, states: "Occasionally cheques are marked or certified by the bankers on whom they are drawn. Doing so does not convert the banker into an acceptor or make him liable on the instrument, but it does constitute a representation by him on which he may be held liable, that the cheque will be paid as drawn if presented within a reasonable time. The effect on the cheque is to give it additional currency by showing on its face that it was drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer the credit of the banker on whom it is drawn."

(1) The object with which marking is done is with a view to ascertain whether the customer has sufficient funds with the banker to be able to get the cheque honoured. If the cheque is marked at the instance of the drawer or the customer, it is quite clear that the drawer will have no right of countermanding payment which, of course, simplifies the question. Sir John Paget, in *The Law of Banking*, says:—

"The object and effect of a banker's marking cheques at the instance of the customer has been stated by the Privy Council to be to further the ready acceptance of the instrument by affording evidence on the face of it that it is drawn in good faith, and that there are funds sufficient and available to meet it, and as adding the credit of the drawee bank to that of the drawer."

The principal danger in the case of the marking of a cheque by the banker arises from the fact that after a cheque is marked the drawer of it may countermand payment, which he has every right to do in the second and third instances cited above, and the banker may be put in an awkward position as he has to indemnify the party for whom he marked should an innocent third party take the cheque relying on such a marking. If, however, the marking was done at the request of the customer the position is simplified because, as we saw above, the drawer cannot countermand without holding himself liable to indemnify the banker for any loss he suffers through his having marked the cheque, the payment of which is now stopped.

(2) The marking between bankers has been legally recognized in England as a custom of bankers by which such a marking is constructed as a promise or undertaking to pay. It is, however, doubtful as to whether a customer can countermand payment after a banker has marked a cheque for another banker. The authorities seem to be conflicting on this point though, of course, the right of the customer to countermand payment previous to such a marking is clearly acknowledged. In one case, *In re Beaumont v. B. Fawbanks*, (1902) 1 Ch. 889, Justice Buckley called such a marking "constructive payment". His Lordship said: "He (Vice-Chancellor Stewart) must have so decided either because the cheque was constructively paid, the bankers having substantially said they would pay so that the payment constructively related back to the date of payment; or because the bankers had in effect said, 'The account is in credit, and we will hold enough of the balance to satisfy the cheque subject to the signature being shown to be genuine'." If the view expressed, viz. that such a marking constitutes a constructive payment, is correct, then, of course, the customer's right to countermand, after such an operation is complete, is lost. It would thus be seen that the position of a banker marking for a banker is considered to be quite distinct from that of a banker marking for his customer, though, of course, how far the decision would be upheld in future is doubtful. With regard to constructive payment Sir John Paget says: "In this as in some other similar cases, the banker's conception of payment would not coincide with the legal. A court would infallibly decline to recognize as payment an operation expressly designed to give currency to a cheque, and performed before its issue."

These remarks of Sir John Paget are based upon the original intention and meaning of marking which is, as we have seen, to make sure that the cheque will be duly paid because the drawer has ample funds and thereby it becomes more acceptable and readily transferable from hand to hand.

(3) The third case, that of a holder presenting a cheque to the banker and getting it marked, is not quite uncommon in India though it is not much prevalent in England, but the practice still prevails largely in America. There has been no decision on this question but it is thought by the best authorities that such a marking would constitute nothing more than an intimation that at the time of marking the banker had a sufficient balance to the credit of the drawer and that there is no appropriation by the banker.

### A Banker and Cheques of his Customers

The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque, must pay the cheque when duly required so to do, and in default of such payment, must compensate the drawee for any loss or damage caused

by such default (Sec. 31). The banker here is in law bound to honour the cheque of his customer if regular and if there is sufficient balance to the customer's credit to enable him to pay out of it. A cheque is not regular when it is not properly signed or indorsed, or when it is post-dated or when it is unstamped or where there is some material alteration which does not bear the customer's initials. The banker must also refuse payment when he hears of his customer's death, insolvency or lunacy, or where the customer countermands payment. The responsibility of the banker here is to his customer and his customer only and, therefore, the holder in case of dishonour must move against the drawer as he has no right against the banker. The customer, however, whose cheque has been wrongfully dishonoured, has a right to sue his banker for damages for loss of credit. The damages will be substantial, if the customer happens to be a trader.

The presentment of a negotiable instrument, either for acceptance or payment, may be made to the duly authorized agent of the drawee or acceptor or maker ; in case the drawee, acceptor or maker is dead, the presentment may be made to his legal representative, or, if he has been declared an insolvent, to his assignee (Sec. 75).

#### **Presentment of a Bill excused**

In the following cases presentment is excused and the bill may be dealt with as dishonoured :—

- (i) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or, if the bill is payable at his place of business, he closes such place on a business day during the usual business hours, or, if it is payable at some other specified place, neither he nor any person authorized to pay it attends at such place during business hours, or where he cannot after due search be found ;
- (ii) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment ;
- (iii) as against any party if, after maturity, with the knowledge that the instrument has not been presented he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment for payment ;
- (iv) as against the drawer, if the drawer could not suffer damage from the want of such presentment (Sec. 76).

#### **Presentment of a Bill at Bank**

If a bill is made payable at a specified bank where it has been duly presented for payment and dishonoured, if the banker so negligently

or improperly keeps, deals with or delivers back, such bill as to cause loss to the holder, he must compensate the holder for such loss (Sec. 77).

### **Fictitious Payee**

If the person named in a cheque or a bill happens to be a fictitious or non-existing person, the bill is treated as a bill payable to the bearer according to Section 7 (3) of the English Bills of Exchange Act. Thus if a cheque is drawn as it used to be common in England at one time as payable to "wages or order", "petty cash or order", it was treated as payable to bearer, because here it is apparent that the payee is a fictitious or non-existing person. English bankers, however, discourage such cheques being drawn by their customers. In England it has been held that not only where a fictitious name is inserted, the bill is deemed to be payable to bearer, but that even the fraudulent insertion of the name of a real person may constitute a fictitious payee. (*Vagliano v. Bank of England*, (1891) A.C. 107.) The Indian Negotiable Instruments Act does not deal with this point and the question as far as India is concerned is not free from doubt.

### **Maturity**

In the case of a promissory note or a bill of exchange, when made payable "at sight" or "on presentation" it is equivalent to payable on demand. Where an instrument is made payable "after sight" it means, in the case of a promissory note, after presentment for sight, whereas in the case of a bill of exchange it would mean either after it is accepted, or if not accepted after it has been noted or protested for non-acceptance (Sec. 21). Thus in calculating the maturity of a promissory note or bill which is not payable on demand, at sight or on presentation, three days, known as days of grace, must be added to the date on which the note or bill is made payable (Sec. 22). This rule applies whether the amount of the bill is payable in full or in instalments. In the latter case, the three days of grace should be added in calculating the due date of each instalment. Our Act makes the addition of these days of grace compulsory, though originally the addition of these days in England and other European countries was purely voluntary. The custom is made compulsory now both in England and India by legislation, though in the principal European countries as well as in America it has been abolished. Thus the question whether these days are to be added or not will be decided by the law of the country where the instrument is payable. Again, the corresponding section of the English Act (Sec. 14) permits the drawer or maker to make the bill or note payable at a date to which the days of grace are not to be added by clearly expressing such an intention in the body of the instrument, but our Indian Act does not give such a power.

### How to Calculate Maturity

While calculating the date on which a bill or promissory note which is made payable so many months after date or sight, falls due, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated or sighted or accepted or noted or protested for non-acceptance. If the month in which the period should terminate has no corresponding day, the period shall be held to terminate on the last day of such month (Sec. 23). Where months are stated, calendar months are to be reckoned. Thus if an instrument dated 29th January 1878 is payable one month after date, it falls due on the 3rd day after 28th February 1878 and an instrument dated 30th August 1878, made payable three months after date, is due on 3rd December 1878.

In the case of an after-sight bill accepted for honour in India, the period is to be calculated from the day on which it was so accepted, and not, as in England, from the date of noting for non-acceptance. If the date on which the instrument falls due is a public holiday, the instrument shall be deemed to be due on the next preceding business day (Sec. 25). Here our Indian Act makes no distinction between bank holidays and other holidays as is done by the English Act where it is laid down that when the last day of grace is a Sunday, Christmas Day, Good Friday or a day appointed by Royal Proclamation as a public fast or thanksgiving day the bill is payable on the preceding business day, but when the last day of grace is a bank holiday, or a Sunday and the second day of grace a bank holiday, the bill is due payable on the succeeding business day.

### Inchoate Instruments

When a person signs and delivers to another a stamped paper in accordance with the law relating to negotiable instruments in blank, or partially written, he is thereby taken to give *prima facie* authority to the holder to make or complete upon it a negotiable instrument for any amount specified therein, and not exceeding the amount covered by the stamp, and thus, the person so signing shall be liable upon the instrument in the capacity in which he has signed to a holder in due course (Sec. 20). This section is based on the rule of estoppel. Here the person by signing the document and delivering to others in blank or incomplete form, lays himself open to this risk through his own act. The necessary condition present here is that the document ought to be stamped according to rules applying to negotiable instruments and should have been given to a holder apparently with a view to be converted into a negotiable instrument. Not only the original holder, but even a subsequent holder may fill it up, but a mere agent for safe custody cannot. Besides, the document must be filled in before it can be enforced.

**Ambiguous Instruments**

When an instrument is so made out that it can be construed either as a promissory note or a bill of exchange, the holder may, at his election, treat it as either, and the instrument shall be thenceforth treated accordingly (Sec. 17). This occurs when drawer and drawee are the same person or where the drawer is a fictitious person or does not have the capacity to accept the bill or to contract. Once the holder makes his election, however, he is bound by it.

**Usances**

In some European countries bills are drawn at usances, i.e. payable after a period fixed by custom for payment of a draft drawn in one country on another and made payable there. The usances have to be proved in each particular case by the person who pleads usance.

**Bill by a Joint Stock Company**

The capacity of a joint stock company to draw, accept or indorse a bill of exchange, or make and indorse a promissory note, depends on its constitution or the nature of the business on the same principle as its power to contract as well as to borrow and lend money is determined. This point is more fully dealt with in the chapter on Company Law.

**Acceptor, Maker and Indorser**

In the absence of a contract to the contrary, the maker of a promissory note, and acceptor before maturity of a bill of exchange, are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand (Sec. 32). If they fail to do so they will be liable to compensate the holder for loss or damage sustained, as we shall see hereafter. This liability is absolute and unconditional. They are liable even though the instrument was not presented to them for payment on the due date. The only case contemplated by the words "contract to the contrary" is that of an accommodation acceptor of a bill or maker of a note who is not bound to pay it if presented by a party to the accommodation, though he would of course be liable to a *bona fide* holder in due course. Again, only a drawee or one or all or some of the several drawees, or "cases in need" as mentioned in the instrument, or an acceptor for honour, can accept and be bound on a bill (Sec. 33). If the bill is accepted by a stranger he cannot be rendered liable as such.

With regard to the liability of the indorser, Section 35 lays down that "In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity without, in such

indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to or received by such indorser." This liability after dishonour is as upon an instrument payable on demand. The indorser not only transfers the document and his right, title and interest in it to the indorsee, and in case of the *bona fide* holder even a better and complete title though his own title may be defective, but he also undertakes that in case the bill or note is not paid when duly presented for payment according to its tenor, he (the indorser) will himself pay. The condition precedent here is that it should be presented for payment on the due date and in case of dishonour due notice should be given to him. Thus every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied (Sec. 36). The maker, drawer and acceptor are principal debtors to a holder in due course, whereas the other parties are liable as sureties for either maker, drawer or acceptor (Sec. 37).

The holder, however, must see that he does not impair any of the prior indorsers' rights because if he does so the said indorser will be discharged from his liability, e.g. A is a holder of a bill of exchange made payable to the order of B which contains the following indorsements in blank.—

First indorsement	"B".
Second indorsement	"Peter Williams."
Third indorsement	"Wright & Co."
Fourth indorsement	"John Rozario."

This bill A puts in suit against John Rozario, and strikes out, without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario (Sec. 40). This is because every indorser undertakes to indemnify his subsequent indorser or holder under him provided his rights are left unimpaired so that he can step into the shoes of the party he indemnifies as far as his right of recovery from prior parties is concerned.

Again, if a drawee accepts a bill on which there is a forged indorsement of which he knows or has reason to believe that it is forged, he cannot refuse to pay on that ground. It would, of course, be otherwise if the acceptor did not know that the indorsement was forged (Sec. 41).

### Lost Bill

Where a bill of exchange is lost before it is overdue, the holder may apply to the drawer to give him another bill of the same tenor



giving security to the drawer, if required, to indemnify him against all persons in case the lost bill should again be found, and in case the drawer refuses he may be compelled to do so [Sec. 45 (a)]. This rule only applies to bills and not to promissory notes and the right to claim a new bill is only against the drawer, but the section is silent as to whether the acceptor and indorser can be compelled to accept it and indorse, respectively.

## DISCHARGE

The maker, acceptor, or indorser of a negotiable instrument is discharged from liability thereon under any of the following circumstances :—

- (1) By payment.
- (2) By cancellation.
- (3) By release.

### (1) PAYMENT

When payment is made at maturity, if it is of the exact amount due on the bill, note, or cheque, and is made to the holder of the instrument, it will discharge every party to the bill from his liability to pay the amount. Payment by a stranger, if made on behalf of the party liable, will also be a discharge as if authorized by the party. An instrument made payable to bearer may be paid in due course as per its apparent tenor. If, however, it is payable to a specified person or to order it should be paid to the legitimate holder. Where a bill or cheque has been materially altered either in the body or in the crossing, or where a crossing is obliterated even then, in case the alteration or obliteration is not apparent and the instrument is paid *bona fide* such a payment shall discharge the party liable thereto. If a payment is made to a wrong person it may be recovered from that wrong person by the person who made such a payment. In this connection, the following rule laid down in Section 81 of the Act is important :—

Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange, or cheque, is before payment entitled to have it shown, and is on payment entitled to have it delivered up to him, or if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him.

The amount due on the bill must include the interest, if any, at the specified rate expressly agreed upon, which is to be calculated on the amount of principal money from the date of the instrument until tender or realization of such amount, or until such date after the institution of a suit to recover the amount as the court directs (Sec. 79).

**Interest on Amount**

If, however, no rate of interest is specified in the instrument, interest on the amount due thereon is to be calculated at the rate of 6 per cent per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the court directs. An indorser, however, who has to pay a dishonoured instrument is liable to pay interest only from the time he receives notice of the dishonour (Sec. 80).

The person paying the amount due on a negotiable instrument is entitled to have it delivered to him. If the instrument is lost or cannot be produced, he is entitled to be indemnified by the payee against any further claim on the said instrument against him. Of course, the payment ought to be made in the current legal tender of the realm and a tender by cheque is not a legal tender and will be accepted at the creditor's option. When the creditor accepts a cheque in payment, he is presumed to have taken it as a conditional payment.

The bill must be paid to the holder or his duly authorized agent and for this purpose it has been held that the fact that a person possesses the document as apparently payable to him is presumed to be the holder in the absence of other evidence. In the case, however, of a person who holds the instrument under a forged indorsement, the acceptor should not pay otherwise he may have to pay once over again to the rightful owner. This rule does not apply to cheques, as under Section 85. "Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course." If an instrument is paid before maturity it can be re-issued and thus it is not discharged in such a case. The payment again should be made in legal tender money, and in this regard the ordinary rules applicable to agreements, which we have already dealt with, will apply. If the holder, however, agrees, the bill may be discharged by delivery of goods or cancellation of a debt or issue of a fresh bill, note or cheque. The payment should be made by or on behalf of the acceptor or maker because if the payment is made by an indorser or drawer or a stranger, the bill is not discharged for obvious reasons unless it is an accommodation bill.

With regard to interest, the rate agreed, as we have seen, is payable. Here, of course, if the agreed rate is in the opinion of the court usurious or excessive, the court has, as we have already seen in a previous chapter, the power under the Usurious Loans Act to interfere and order a fair rate only to be paid. This interest will be payable from the date of the instrument up to the date of its discharge. The person liable to pay has a right to call upon the production of the instrument, and on payment to get it delivered up to him; in case the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him (Sec. 81).

## (2) CANCELLATION

If the holder of a negotiable instrument cancels the acceptor's or the indorser's name with the intention to discharge him and all parties claiming under such holder, such an acceptor or indorser is considered discharged with regard to his liability as far as all parties claiming under such holder are concerned (Sec. 82). Also where the holder destroys or impairs the indorser's remedy against a prior party, without that indorser's consent, as we have already seen, that indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity (Sec. 40).

It is also open to the holder to dispense with or to meet wholly or in part the performance of the promise made to him either by tearing up or cancelling the instrument if done so with that intention.

Of course the cancellation must have been made deliberately and not under any mistake. The best method of cancelling a negotiable instrument is to cancel the signatures by drawing a line through them or by writing the word "cancelled" across the instrument. Cancellation of any one signature out of the lot will discharge the party whose signature is cancelled, as well as parties subsequent to it. Thus cancellation of the signature of the drawer will discharge all indorsers.

## (3) RELEASE

On the same principle; as in the case of cancellation, the holder of an instrument may release or discharge its maker, acceptor or indorser. Also where the holder accepts satisfaction in any form other than a payment in cash, such a substitution of a new contract, or an alteration of the old one, will be an ample discharge or release as far as the old instrument is concerned.

We have also seen that if the holder of the instrument allows it to remain with the drawee for more than 24 hours without the consent of the previous parties they are released by such conduct of the holder.

## ALTERATION

It may also be noticed that any material alteration of a negotiable instrument renders it void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. Such an alteration, if made by the indorsee, discharges his indorser from all liability to him in respect of the consideration thereof (Sec. 87).

It may, however, be added that the alteration in order to come under the rule must be a material alteration and the mere fact that the alteration was made with dishonest intention will not render the instrument void.

**Material Alterations**

An alteration is material when (1) it is of the date, made with a view to reduce or increase the period of its currency, (2) it is of the sum payable, (3) the period for which it is drawn is altered, e.g. where a bill to run for three months is made to run for six, (4) a new party is added, (5) rate of interest is altered, or (6) the place of payment is altered.

Alteration by a stranger will have the same effect as if it were made by the party himself, as it is the duty of the holder of a negotiable instrument to preserve and safeguard it against such frauds.

**Immaterial Alterations**

Alterations such as (1) conversion from order into bearer or bearer into order by the rightful party, (2) addition of the words "on demand" in instruments where no time of payment is mentioned, (3) subsequent addition of the signature of a witness to a signature by a party, and (4) alteration to correct a mistake, are not material alterations and will not vitiate the instrument.

**Permissible Alterations**

Alterations such as (1) crossing of cheques, (2) conversion of blank into special indorsements, (3) filling in of blanks in the case of inchoate instruments, (4) qualified acceptance, are permitted by the Negotiable Instruments Act.

**Accidental or Unapparent Alteration**

Again, if an alteration has been only made by accident that will not be a ground for avoiding the instrument. The parties seeking to enforce would have to show the circumstances under which the accidental alteration came to be made. We have, of course, seen that an alteration such as making a bearer cheque into an order cheque, or converting an order cheque into a bearer cheque, by the proper party, is permissible. Besides, as we have already noted above, where a promissory note, bill of exchange or cheque has been materially altered, but such an alteration does not appear on the face of it, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated and if such a document has been paid by a person or by a banker liable on it according to the apparent tenor thereof at the time of payment and otherwise in due course, such a person or banker shall be discharged from all liability on that instrument and such a payment shall not be questioned by reason of the instrument having been altered or the cheque crossed (Sec. 89).

In English law such protection is given only to a banker who pays an altered crossed cheque, whereas in India it is extended to

persons who pay bills and notes also. Of course, the alteration should be such as is not apparent on the instrument; it should have been made in due course and it must have been made by the person liable upon it.

An acceptor or indorser is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

Again, if a bill of exchange after going through its regular course of negotiation happens to come back at or after maturity into the hands of the acceptor in his own right, all rights of action are extinguished thereon (Sec. 90).

### DISHONOUR

(A bill, ~~as we have seen~~, is said to be dishonoured when the drawee refuses to accept it when duly presented, or when it has been accepted and the acceptor fails to meet it on due date. A bill must be presented for payment to the acceptor on the due date, at his business place, and at a reasonable hour. If he has no place of business, it may be presented at his residence.) The presentment must be made to the acceptor or his agent duly appointed. If a bill is dishonoured by non-acceptance the party can move for his remedy without waiting for the time of maturity in order to present it for payment. (*Ram Rauji Jambhekar v. Pralhaddas Subkarn*, 20 Bom. 133.)

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured (Sec. 19)

### Notice of Dishonour

As soon as a bill is dishonoured, the holder must give notice of dishonour to the drawer and all previous indorsers (Sec. 93). The notice, though not required to be in writing at law, must be a written notice for safety. The notice must be given within a reasonable time, i.e. if both the giver and the receiver of the notice reside in the same place, it should be given so as to reach at least on the day after dishonour. If they live in different places, the notice must be posted not later than the day after dishonour. If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid (Section. 94).

Anyhow, the holder must give notice of dishonour within a reasonable time. Of course, if for some reason the notice could not be given or did not reach any of the parties, through no fault of the giver of the notice, he would be excused. (Otherwise failure to give notice within a reasonable time would release all indorsers previous to the party failing to give notice, as well as the drawer.

The notice has to be given with a view to warn the parties of their liabilities and not with a view to demand payment.) The notice has to be given even though the party is aware of the dishonour. This notice has to be given in the case of dishonour of a *hundi* also and if

any local usage to the contrary in connection with these *hundi*s exists, such usage has to be proved. The notice has to be given at the place of business of the party concerned and in case the party has no such place, at the residence of such a party (Sec. 94).

The notice should be given either by the holder, his agent or any party liable on it. A notice by a stranger will be inoperative. (If the notice of dishonour is not given to the drawer or an indorser they will be discharged from liability except in cases where the law dispenses with such a notice) as we shall see hereafter. The holder should give notice to all the parties he can so as to be on the safe side. He should, as we have seen, at least give notice to the party immediately prior to him or his agent within a reasonable time in order to bind him, and that party should give it to the party prior to him, and so on. If the holder and the party to whom this notice is to be given carry on business or live in different places, such notice is given within a reasonable time if it is despatched by the next post, or on the day next after the day of dishonour. If they live or carry on business in the same place, the notice should be despatched in time to reach its destination on the day next after the day of dishonour (Sec. 106). The party receiving the notice has the same time within which to notify prior parties (Sec. 107). The notice may also be sent by a special messenger. The notice of course should be properly addressed. The notice should state the fact of the bill having been dishonoured and in what way the party to whom it is given will be liable thereon. If the notice is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice (Sec. 96).

In case where the instrument is payable at a foreign place, the law of the place of payment will determine what constitutes dishonour and what notice of dishonour is sufficient.

When the party to whom the notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient (Sec. 97).

The party who receives a notice of dishonour is allowed, at the same time after the receipt of such a notice, to warn by notice his prior holders.

### Notice when Unnecessary

(Under the following circumstances notice of dishonour is unnecessary :—

- (a) when it is dispensed with by the party entitled thereto ;
- (b) in order to charge the drawer when he has countermanded payment ;
- (c) when the party charged could not suffer damage for want of notice ;

- (d) when the party entitled to notice cannot after due search be found; or the party bound to give notice is for any other reason, unable without any fault of his own to give it;
- (e) to charge the drawers when the acceptor is also a drawer;
- (f) in the case of a promissory note which is not negotiable;
- (g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument (Sec. 98).

The above section lays down the circumstances under which notice of dishonour is excused. The party who has not given notice and wants to be excused for it should prove that his case falls under any of the above named exceptions. The notice may be waived before or after the date on which the notice ought to have been given. The omission of notice may also be excused when it is due to death, illness, accident to the holder or any other unavoidable circumstance. Ignorance as to the address of the party to whom the notice is to be given is also an excuse, provided due diligence is shown in trying to trace his whereabouts.

## NOTING

Besides giving the notice, as above referred to, the holder must get the bill "noted". This is done through a notary who presents the bill, notes down in his register the facts of its dishonour and the reason, if any, given by the acceptor for so doing. Such noting must be made within a reasonable time after dishonour and must specify the date of dishonour, the reason, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges (Sec. 99).

The rules with regard to noting and Notaries Public are to be found in G.O. No. 1433, dated 30th September 1886, and may be summed up as follows:—

The Notaries Public shall keep books and registers in which they shall record declarations of payment for honour (Sec. 113), and shall also register noting and protests made by them. The copies of all the letters which they may write presenting bills for acceptance, or payment, or better security, as well as those of all bills noted or protested or paid for honour, together with all indorsements thereon (including those made by themselves to the effect that the bill has been noted or protested for non-acceptance or non-payment or want of better security), shall also be recorded in these registers. Each entry shall have to be signed by these Notaries, or in case the demand for acceptance or payment or better security has been made by a clerk, they shall cause the clerk also to affix his signature. The pages of these registers should be consecutively numbered. These registers shall be open for inspection

of the District Judge or such other officer as the Local Government shall, from time to time, appoint.

### FORM OF NOTING

(To be made upon the instrument or upon a paper attached thereto, or partly upon each.)

Reference to page in Notarial Register

Date of presentment and dishonour.

Reason, if any, assigned for dishonour (or, if the instrument has not been expressly dishonoured, reason why holder treats it as dishonoured)

Date of note.

Notary's charges

(Sd.) A. B.  
Notary Public.

### PROTEST

#### Protest for Better Security

When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused, may, within a reasonable time, cause such facts to be noted, and certified as aforesaid. Such a certificate is called a protest for better security (Sec. 100)

#### Protest of Foreign Bills

When the bill is a foreign bill, it requires both to be "noted" and "protested".

The protest must contain—

- (a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereon ;
- (b) the name of the person for whom and against whom the instrument has been protested ;
- (c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public : the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found ;
- (d) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal ;
- (e) the subscription of the notary public making the protest ;
- (f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, or the person for whom, and the manner in which, such acceptance or payment was offered and effected.

A Notary Public may make the demand mentioned in clause (e) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter (Sec. 101).



In the case of inland bills noting alone is sufficient.

It may be added here that foreign bills of exchange must be protested for dishonour only when the law of the place where they are drawn requires such a protest (Sec. 104).

### Acceptance for Honour

The "acceptor for honour" is defined as:—

When a bill of exchange has been noted or protested for non-acceptance or for better security and any person accepts it *supra protest* for honour of the drawer or of any one of the indorsers, such person is called 'an acceptor for honour' (Sec. 7).

Section 108, Negotiable Instruments Act, further amplifies this by stating that "Where a bill of exchange has been noted or protested for non-acceptance or for better security, any person, not being a party already liable thereon, may, with the consent of the holder, by writing on the bill, accept same for the honour of any party thereto" [Sec. 65 (1), Eng. R. E. Act]. As to how this acceptance for honour must be made, Section 109, N. I. Act, lays down that the party must, "by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour." When the acceptor does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer [Sec. 110, N. I. Act; Sec. 65 (4) Eng. R. E. Act].

The "payee" is defined as:—

The person named in the instrument to whom or to whose order the money is by the instrument directed to be paid, is called the 'payee' (Sec. 7).

### A "Case in Need"

In the case of foreign bills, a "case in need" is generally stated on the bill. This "case in need" is the agent of the drawer in the foreign country, where the bill is made payable. When, therefore, the bill is dishonoured either by non-acceptance, qualified acceptance, or by non-payment, the holder refers it to the "case in need". The "case in need" either gets the proper acceptance, or failing that, gets the bill protested for non acceptance and accepts it himself for the "honour of the drawer". This is known as an "acceptance for honour *supra protest*". The holder then holds it till the due date when he presents it again to the drawee for payment, which must be done because in case of an acceptance for honour this is an implied condition precedent without fulfilment of which the acceptor for honour is not bound to pay the bill. Another condition is that the bill must be noted and protested by the holder before he comes to the acceptor for honour. Here also the person paying for honour must declare before the Notary Public the name of the party for whose honour he pays and the said alteration

must be recorded by the Notary. If payment of the bill be also refused, he should first get it protested for non-payment and then present it to the "acceptor for honour" who pays for the honour of the drawer.

The object served by this acceptance and payment for honour by the "case in need" is to save expense by way of interest and loss on exchange which would necessarily follow, as these foreign bills are generally drawn and discounted in the country of their origin. In the absence of such an arrangement, on the drawee's refusal to accept or pay the bill, the banker's foreign agent or branch office would refer the bill back to the office through which it was sent to him for collection. This would mean waste of time during the whole of which the banker's interest keeps running, not to speak of the great inconvenience to the drawer and loss on exchange, whereas it may be that the refusal to honour was based on grounds which could easily have been settled by an agent on the spot.

In the case of acceptance for honour, the said acceptor binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill, if the drawee does not, and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance (Sec. 111). He, virtually speaking, steps into the shoes of the party for whose honour he accepts as regards rights and liabilities.

It may be noted, however, that protest is only necessary in the case of foreign bills, specially when they appear to be such, but if there is nothing on the face of the bills to indicate their foreign origin, they need not be protested. The protest is not necessary in the case of a foreign promissory note.

### COMPENSATION

The amount payable in case of dishonour of a bill or cheque by any party liable to the holder, includes the amount due upon the instrument with interest, plus the expenses properly incurred in noting and protesting it. When the person charged resides at a place different from that at which the instrument is payable, the holder is entitled to receive such sum at the current rate of exchange between the two places. If an indorser of a bill has paid the amount due on it, he is entitled to the amount so paid plus expenses with interest at the rate of 6 per cent per annum from the date of his paying to the date of his receiving back the amount; and where the indorser and the person charged reside at different places the indorser would be entitled to receive such a sum at the current rate of exchange between the two places. It is also open to the party entitled to compensation on dishonour of such a bill, note or cheque to draw a bill on the party liable to compensate him making it payable at sight or on demand for the amount due to him together with all expenses properly incurred by him. Such a bill

must be accompanied by the instrument dishonoured and the protest thereof, if any. If such a bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill (Sec. 117).

### **PRESUMPTIONS**

The following presumptions shall be made in the case of negotiable instruments until the contrary is proved :—

- (1) that every negotiable instrument was drawn, accepted and indorsed, made or transferred for consideration ;
- (2) that the date it bears is the date on which it was made or drawn ;
- (3) that it was accepted within a reasonable time after its date and before its maturity ;
- (4) that every transfer was made before maturity ;
- (5) that the indorsements appearing upon it were made in the same order in which they appear ;
- (6) in the case of a lost instrument that it was duly stamped ;
- (7) that the holder of it was a holder in due course (Sec. 118).

In the case of negotiable instruments, contrary to the ordinary law of agreements, consideration is presumed and the party who denies it must prove his case. This applies to drawing, accepting as well as indorsing. The next presumption is the correct date. Also that both its acceptance and transfer were made before maturity. That the indorsements were placed in the order in which they appear on the bill and that in the case of lost instruments the presumption is that it was properly stamped. All these presumptions can be rebutted by evidence but the party challenging them must prove his case.

### **ESTOPPEL**

A maker of a promissory note or the drawer of a bill of exchange or cheque or an acceptor for honour is estopped from denying the validity of the instrument made or drawn to the holder in due course. A maker of a note, or an acceptor of a bill payable to the order of a specified person, is similarly estopped from denying the payee's capacity at the date of the note or bill, to indorse the same. An indorser of a negotiable instrument is not permitted to deny either the signature or the capacity to contract of any prior party to a holder in due course (Secs. 120-22).

### **BILLS IN SETS**

Bills of exchange may be drawn in parts. This is generally done when they are to be sent from one place to another in order to avoid the inconvenience arising from the instrument being lost in the course of transmission. Each part in such a case is numbered and contains a provision that it shall continue payable only so long as the others remain unpaid. All the parts together make a set ; but the whole set consti-

takes only one bill, and is extinguished when one of the parts is paid or discharged. To this rule the exception is that where a person accepts or indorses parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill (Sec. 132). There is, of course, no obligation on the drawer to draw a bill in a set even though it is to be sent to some other country for acceptance.

### INTERNATIONAL LAW

In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque, is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable (Sec. 134). As to dishonour and notice of dishonour the law of the place where it is made payable is applicable (Sec. 135). The law of any foreign country regarding promissory notes, bills of exchange or cheques is presumed to be the same as that of British India, unless and until the contrary is proved (Sec. 137).

### HUNDIS

The Negotiable Instruments Act generally does not apply to instruments in any oriental language (*hundis*), but where by any words in the instrument itself the usages regarding such instruments are excluded, or where the writing expressly indicates an intention that the legal relations of the parties thereto shall be governed by the Negotiable Instruments Act, the Act will apply. In the absence of either of these indications, *hundis* in oriental languages shall be governed by local usages applying to such documents. *Hundis* are generally divided into two classes, viz. (a) the *Shah joghi hundis*, and (b) the *Jokhmi hundis*.

The *Shah joghi hundi* is drawn by one merchant on some other merchant asking the latter (drawee) to pay the said *hundi* to a *shah*, i.e. a respectable holder, after making proper enquiry and taking the usual precautions taken by merchants in that line of business. It usually states the name of the person on whose account the *hundi* is drawn, or who has (as is usually the case) deposited money with the drawer against the *hundi* in question. The documents are generally used for the purpose of remittances. The drawer never accepts this *hundi* but generally they are presented to the drawer at the time of payment by the holder. These are not instruments which come under the designation of those "payable to bearer", but are payable to a "respectable holder" or "shah", and the usage throws this duty on the drawee, i.e. the duty of ascertaining that the payee is a "shah". In case the *hundi* is indorsed as payable to a particular person named in the indorsement, the drawee must see that he pays to that person and no other. As long as the drawee pays the said *hundi bona fide* to a "shah", he is entitled to recover the

amount from the drawer. If the "shah" makes a mistake in collecting the *hundi* for a wrong party, he has to make good the amount with interest at the rate of 6 per cent from the date of payment to the date of refund.

**The *Jokhmi hundi*.** In the words of Bayley, J. (*Raisey Amerchand v. Juraj Visp.*, Bom. 25th July 1871): "A *Jokhmi hundi* is in the nature of a policy of insurance, with this difference, that the money is paid beforehand, to be recovered, if the ship is not lost." It is in fact a mode of insuring goods shipped peculiar to the native Indian merchants. There are here three parties—the drawer or shipper of the goods, the *hundiwala*, i.e. the underwriter, and the *malwala*, the consignee. The consignor consigns the goods, say from a port in Cutch or elsewhere to his agent or vendor in Bombay. He then draws a *hundi* on the consignee or *malwala* for the value of the goods and sells it to the insurer for cash which is the value less the insurance premium charged. The *hundiwala* either sends the *hundi* to his branch office or agent in Bombay. The *hundi* is then presented after the goods arrive safe in Bombay to the consignee or *malwala* who pays and takes delivery of the goods, or in case he does not wish to take up the goods he may hand over the goods to the *hundiwala* and leave him to fight the matter out with the consignor. The *hundiwala* by this peculiar custom has no right to sue the *malwala* or consignee in case of non-payment or non-acceptance. His remedy is to recover the amount from the consignor. In case the goods are lost totally the *hundi* cannot be presented and the loss has to be borne by the *hundiwala* or underwriter. In the case of partial loss or damage, the *hundiwala* is entitled to be paid in full. In the case of general average loss the *hundiwala* or underwriter receives payment for so much loss as may be computed towards the general average loss on these goods by the Average Adjusters (4 Bom. 344-45).

The form in which these *Jokhmi hundis* are generally drawn, as given in the above reference (4 Bom. 344), is the following:—

"To wit: here have been kept and retained from Shah.....  
Rs..... in full: so the *hundi* is *jokhmi* on board the  
vessel.....nakwa....., owner..... After the fixed  
time 4 (four) days after the vessel shall have arrived safely from  
the sea-port town of.....at the sea-port town of.....  
do you pay to Shah....."

### Zikri Chitu

As per Chalmers' *Negotiable Instruments*, hundis, according to the custom of Marwari merchants, "are accepted for honour by means of 'Zikri chitu' which are furnished by a party liable on the *hundi*, to the holder, and are addressed to some other person who is thereby directed to pay the *hundi* if the drawee does not; the latter accepts by writing on the chit." The hundis, according to the custom of shroffs, are not required to be noted or protested.

## CHAPTER XI

### COMPANY LAW

A COMPANY may be defined as an artificial person created by law with a perpetual succession and a common seal. Justice Lindley defines a company in the following terms :—

"An association of members, the shares of which are transferable. As distinguished from partnership, I know of nothing else except the transferability of shares."

Companies registered under the Companies Act, both in India and in England, may be divided into two headings, viz. :—

- (1) Private companies, and
- (2) Public companies.

A *private company*, according to the Indian Companies Act, 1913, means a company which by its articles restricts the right to transfer its shares, if any, and limits the number of its members to fifty not including persons who are in the employment of the company, and prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company and continues to observe such restrictions, limitations and prohibitions throughout its existence [Sec. 2 (13)]. In a private company there should be not less than two and not more than fifty members. The section provides for those in the employment of the company being excluded. What is required is that the person so holding should be in the employment when the shares are allotted, after which he may leave the company and that would not affect the number fixed by the law. In actual practice, articles of association usually provide for the purchase by present shareholders of shares belonging to employees leaving service. A private company, as far as India is concerned, is a new institution created by our Indian Companies Act, 1913, and such a company is exempt from the provisions of the Indian Companies Act as to the filing of a copy of its balance sheet and submitting its statutory report to the registrar. A private company in its articles of association may enforce all restrictions, limitations, and prohibitions, peculiar to a private company. A private company is also exempt from the requirements of the Indian Companies Act as to its yearly audit, and in case of such private companies the auditor, if any, need not possess the qualifications as laid down in Section 144 of the Indian Companies Act. Of course, no director or officer of a company can be an auditor even in the case of a private company, and that seems to be the only restriction provided for by law in the case of private companies. The advantage of a private company as claimed by some is that a private company is not compelled to disclose

the statement of its accounts to the public. This seems, no doubt, to be a doubtful advantage, but it is thought by some writers that joint family businesses may take advantage of this Act and convert themselves into private companies with limited liability.

A *public company*, on the other hand, is a company formed under the Companies Act, which offers its shares to the public and advertises such offer in a prospectus. Our new Act, in the case of the prospectus of a joint stock company, lays down conditions and stipulations as to its contents and in this particular case our Act follows the English Company Law. The prospectus as required by the Indian Companies Act, 1913, is discussed fully hereunder.

### THE PROSPECTUS

The prospectus is defined by Sec. 2 (14) as "any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription, or purchase, any shares or debentures of a company but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed. This prospectus is generally issued where it is intended to appeal to the public for subscription of share capital. A private company cannot issue a prospectus, or file the statement in lieu of prospectus, since it cannot invite the public to subscribe for shares; but in the case of a public company it is laid down that the prospectus must be issued in a proper form giving the information as laid down by the Act, or in the absence of such issue, the statement in lieu of prospectus duly signed by every person who is named therein as director or proposed director of a company, or by his agent duly authorized in writing, shall be filed for registration with the registrar on or before the date of its publication. No such prospectus shall be issued unless and until such a copy is filed, otherwise, every person who is knowingly a party to such issue will be liable to a fine not exceeding Rs. 50 for every day from the date of the issue of the prospectus until the date when the copy is filed. It is further enacted that if a public company does not issue the prospectus, as above stated, it shall not allot its shares or debentures, unless at least a statement in lieu of prospectus as above stated is filed. It will thus be seen that the important point in this connection is, that there should be a prospectus issued, i.e. an invitation to the public to take up shares of the company, and therefore, this rule does not apply to a circular or notice, inviting existing members, or debenture-holders of the company, to subscribe either for shares or debentures of the company.

With reference to the contents of the prospectus Sec. 93 of the Companies Act, 1913, as amended upto 1936, lays down as follows :—

**Section 93. (1)** Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares

subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property or profits of the company (and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed the period of notice required and the proposed method of redemption); and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share: and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and

(ee) (where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations); and

(f) the names and addresses of vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

(ff) (where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years as far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus); and

(g) the amount (if any) paid or payable as purchase money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or



procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, (or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents): Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(i) the amount or estimated amount of preliminary expenses; and  
(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(l) the dates of, and parties to, every material contract (including contracts relating to the acquisition of property to which clause (f) applies), and a reasonable time and place at which any material contract or a copy thereof, may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus; and

(m) the names and addresses of the auditors (if any) of the company; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion or, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, (and the rights in respect of capital and dividends attached to), the several classes of shares respectively; and

(p) (where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions).

[1A] Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely,—

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact;

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by

an accountant or accountants holding the certificate referred to in Section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus:

Provided that if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.]

[(1B) The statement referred to in clause (f) of sub-section (1) and the report referred to in sub-section (1A) with reference to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.]

[(1C) Where any part of the sums required for the matters set out in sub-section (2) of Section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof]

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

[Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of Section 154.]

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law of this Act apart from this section.

### Minimum Subscription

Minimum subscription is now specifically provided for by the Amendment Act of 1936 and the old law has been radically altered on the footing of the English Companies Act of 1929. Thus now our Amended Companies Act in Sec. 101 (1), (2) and (2a) lays down that:—

(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum

of at least five per cent thereof has been paid to or received in cash by the company

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely —

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue,

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company

(c) the payment of any moneys borrowed by the company in respect of any of the foregoing matters and

(d) working capital

(2A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription

The same Sec 101 (2C) further lays down that —

In the event of any contravention of the provisions of sub-section (2B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees

### Underwriting Commission

*Underwriting Commission* is the commission paid to underwriters, who enter into a contract with the company or its promoters, guaranteeing that the share capital of the company is offered to the public, would be fully taken up by the public and that in case any balance should remain unsubscribed for it shall be taken up and paid for by them. In consideration of this underwriting a certain commission is agreed to be paid to the underwriters, which is calculated on the whole capital of the company, whether taken up by the public or not. Sec 105 deals with the payment of the underwriting commission as follows —

(1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorized by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorized and if the amount or rate per cent of the commission paid or agreed to be paid is—

(a) in the case of shares offered to the public for subscription disclosed in the prospectus or

(b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice

(2) Save as aforesaid (and save as provided in section 165A), no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of or other person who receives payment in money or shares from a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company would have been legal under this section.

(Of course, this rule does not affect the power of any company to pay such brokerage as has been held lawful for a company to pay.)

### **The Number Required**

In the case of a public company, any seven or more persons may get themselves incorporated as a company under the Indian Companies Act, but no association of more than ten persons shall be formed for the purpose of carrying on a banking business, or no association or partnership, consisting of more than twenty persons shall be formed for the purpose of carrying on any other business, that has for its object, acquisition of gain or profit, unless such an association is registered under the Indian Companies Act. It will thus be seen that an association of more than ten persons carrying on a banking business in partnership, or of more than twenty persons carrying on a trading business without such incorporation, would be an illegal partnership. The members of an illegal partnership in England stand in the unavoidable position of being unable to sue and recover their claims nor can they be sued by their creditors. Every member will, in such a case, be liable for the debts of the company, to the full extent of his property, the liability being unlimited. Members of similar illegal company or partnership, in India, who carry on business in violation of this requirement of the law will be personally liable for all liabilities incurred on such business, they will not be able to sue others or outsiders and they will be liable to a fine, in addition to his disqualification, not exceeding Rs 1,000. In India this rule does not apply to a joint family carrying on joint family trade or business and where two or more of such joint families form a partnership, in computing the number of persons for the purpose of this section, minor members of such families shall be excluded. A company may be incorporated with or without limited liability.

## MEMORANDUM OF ASSOCIATION

The Memorandum of Association of a public company is the charter of the company and has to be drawn out and signed in the case of public companies by at least seven persons and in case of a private company by at least two. No company can be registered without its Memorandum of Association. Each subscriber to the Memorandum has to state before his name the number of shares he agrees to take up. The Memorandum of Association should contain the following information :—

(1) The name of the company (with the word "limited" if it is to be a limited company).

(2) The place of the business of the company.

(3) The object for which the company is formed—a clause which requires to be drafted with great care and ingenuity, because of all documents, the one which is most difficult to be altered at law is the Memorandum of Association of a company, and of all the clauses of the Memorandum of Association the clause which is the most difficult and inconvenient to be altered is its "objects" clause. This clause should clearly state in detail all the departments of business to be carried on by the company, otherwise, the directors might find that they are unable to act on some important question in the absence of the necessary power.

(4) Whether the liability of the members is to be "limited".

(5) The amount of capital of the company, with its proposed division if any, into shares, classifying these shares under the headings of (a) Cumulative Preference, (b) Preference, (c) Ordinary, and (d) Deferred, and stating the amount which is to form the value of each of these shares.

## THE NAME

With regard to the name of a company care should be taken to see that the company does not adopt a name already registered by some other company, or which is likely to create an impression that the company is carrying on the business of some other existing company, e.g. in *Madame Tussard & Sons v. Tussard*, (1890) 44 Ch.D. 678, the defendant, whose name was Louis K. J. Tussard, was prevented from registering a company under the name of "Louis Tussard, Limited" as it resembled that of the plaintiff company. In *Huntley and Palmer v. Reading Biscuit Co.*, (1842) 9 T.L.R. 462, the defendants were restrained by injunction from using the word "Reading" as descriptive of or in connection with its biscuits without clearly distinguishing them from the plaintiff's biscuits. Here the basic principle is that similarity of name should not mislead the public. This generally happens when they are in the same line of business not otherwise. [*Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co.*, (1907) A. Cas. 430.]

The other point to be noted in connection with limited liability companies is that on the signboard as well as on all the circulars, letter forms, etc. used by the company, the word "limited" should appear with the name of the company.

## THE OBJECTS

The "objects" clause of the Memorandum being the most important has to be drafted with great care. Full and complete powers must be taken for all business in which the company is likely to be engaged and such business clearly stated. The words such as "to do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them" would only cover operations of a nature similar to the subjects specially stated and will not include any entirely new business. [*London Financial Association v. Kelk*, (1884) 26 Ch.D. 107.]

## LIABILITY OF MEMBERS

Here the contract words to be used in the Memorandum are "liability of Members is limited" and not that "the liability of the company is limited".

### Our Act and the Memorandum

With regard to the Memorandum our Act lays down that—

Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of Association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say,) either—

(i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company) (Sec. 5).

*In the case of a company limited by shares—*

(1) the memorandum shall state—

(i) the name of the company, with 'limited' as the last word in its name;

(ii) the province in which the registered office of the company is to be situate;

(iii) the objects of the company;

(iv) that the liability of the members is limited;

(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount.

(2) no subscriber of the memorandum shall take less than one share;

(3) each subscriber shall write opposite to his name the number of shares he takes (Sec. 6).

*In the case of a company limited by guarantee—*

(1) the memorandum shall state—

(i) the name of the company, with 'limited' as the last word in its name;

- (ii) the province in which the registered office of the company is to ~~be~~ situate,
  - (iii) the objects of the company;
  - (iv) that the liability of the members is limited;
  - (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount,
  - (2) if the company has a share capital—
    - (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount,
    - (ii) no subscriber of the memorandum shall take less than one share,
    - (iii) each subscriber shall write opposite to his name the number of shares he takes (Sec 7)
- In the case of an unlimited company—*
- (1) the memorandum shall state—
    - (i) the name of the company,
    - (ii) the province which the registered office of the company is to be situate,
    - (iii) the objects of the company,
  - (2) If the company has a share capital—
    - (i) no subscriber of the memorandum shall take less than one share,
    - (ii) each subscriber shall write, opposite to his name the number of shares he takes (Sec 8)

### Alteration of Memorandum

The clauses of the Memorandum of Association may be altered under the following circumstances.

#### THE NAME

The *name of the company* can be altered by a special resolution and subject to the approval of the local Government signified in writing. Such a change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company. It may be also added that the section prohibits the use of the words "Crown", "Emperor", "Empire", "Empress", "Imperial", "King", "Queen", "Royal" or words expressing or implying the sanction or approval or patronage of the Crown or Government without the sanction in writing of the Governor-General in Council (Sec 11).

#### THE SITUATION AND THE OBJECTS

With regard to the alteration of the memorandum with a view to change of the situation of its registered office, or with a view to the alteration of the objects clause the same can only be done on its

being shown to the satisfaction of the court that such an alteration is rendered necessary to enable the company—

- (a) to carry on its business more economically and more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or
- (c) to enlarge or change the local area of its operations ; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ; or
- (e) to restrict or abandon any of the objects specified in the memorandum (Sec. 12).

The court confirming the alteration would also have to be satisfied that notice of these alterations was given to the debenture holders, creditors and other persons whose interests in the opinion of the court would be affected by such an alteration and that every creditor who was entitled to object and had objected had either consented to the alteration, or that his claim was discharged or determined or secured to the satisfaction of the court. The alteration of the "objects" does not mean the introduction of an entirely new object. (*In re Cyclist Touring Club*, (1907) Ch. 269.) It may also be added that the object for which the company is to be formed ought not to be illegal and as long as it is not so, there is no limit as to the objects for which a joint-stock company may be incorporated under this Act.

The court has to decide whether the alteration is fair and equitable between the members of the company and if so it would sanction the alteration in case the majority of members as per the voting powers have decided in its favour. If, on the other hand, the wishes of the majority cannot be ascertained the court will refuse sanction. (*Jewish Colonial Trust*, (1908) 2 Ch. 287).

We have already seen that the objects for which a company is to be formed must be stated in the Memorandum with great care. All the phases of the business in which the company is likely to be engaged ought to be fully and clearly stated. Failing that precaution, the directors though acting under the impression that they were within their rights might find some of their actions declared *ultra vires*. It should be remembered that the "objects" clause of the Memorandum limits the actual powers and the scope of the business of a company, and, therefore, in order to avoid the most inconvenient and expensive course, viz. alteration through the court, the following suggestions, as laid down in Palmer's *Company Law*, may well be noted here. Mr. Palmer suggests the insertion of clauses as under, while drafting the objects clause :—

"(1) A clause authorizing the company to carry on their business besides its main business.

"(2) A clause empowering the company to acquire any other business, similar to its own, since it is difficult to imply such power in the Memorandum.



"(3) A clause empowering the company to enter into any agreement for sharing profits, etc. with other persons or companies carrying on any similar business; for very clear powers are necessary to justify such a transaction.

"(4) A clause empowering the company to take shares in any other company having similar objects. Here again clear powers are necessary.

"(5) A clause empowering the company to promote other companies for any purpose calculated to benefit the company. This power, though often required, cannot be implied.

"(6) A clause empowering the company to lend money, and guarantee the performance of contracts.

"(7) A clause empowering the company to borrow or raise money by the issue of debentures, debenture stock or otherwise; for although a trading company has implied power to borrow and give security it is better to have explicit power given, since the question has sometimes arisen whether a particular company is a "trading" company.

"(8) A clause empowering the company to draw, make, accept, indorse, discount and issue notes, bills of exchange, debentures and other negotiable or transferable instruments.

"(9) A clause empowering the company to sell and dispose of the undertaking of the company for shares, debentures, or securities of any other company having objects altogether or in part similar to those of the company. In the absence of an express power like this, a company cannot sell or dispose of its business."

It has been held *ultra vires* for a railway company to work mines or to deal in coal for profits (*Attorney-General v. G. N. Railway Co.*, (1860) 1 Dr. & Sm. 238); whereas in the case of a hotel company, the letting out temporarily of a part of its premises which was not wanted for the purpose of its business was held to be *intra vires*. (*Simpson v. Westminster Palace Hotel Co.*, 8 H.L.C. 712.)

It may be added that of late the view as to alteration of the objects clause has considerably altered and the courts seem to give a more liberal construction. *In re Parent Type Co., Ltd.*, (1923) 2 Ch.D. 222, the principle laid down is that where a company wishes to alter its Memorandum by adding a business, that business may be wholly different from and bearing no relation to the then existing business of the company and yet be capable of being conveniently and advantageously combined with it provided such new business is not destructive of or inconsistent with the existing business.

## THE CAPITAL

### Alteration without Consent of the Court

The alteration of the capital clause of the Memorandum may be effected as laid down below:—

(1) A company limited by shares, if so authorized by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient;

- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;
- (c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination ;
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, ~~so~~, however, that in the sub-division the proportion between the amounts paid and the amount, if any, unpaid on each reduced share, shall be the same as it was in the case of the share from which the reduced share is derived ;
- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section with respect to sub-division of shares must be exercised by special resolution.

(3) Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

(4) If a company makes default in complying with the requirements of sub-section (3), it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made; and every officer of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(5) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act (Sec. 50).

## REORGANIZATION OF SHARE CAPITAL

It may be further added here that if the conditions in the Memorandum are to be modified with a view to reorganize the company's share capital the following rules would hold good :—

(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

"Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all the shareholders of the class" (Sec. 54).

It will be seen from the above that an increase in the share capital may be effected without much difficulty. In case the Articles do not provide for such an increase, an alteration of the Articles to that effect may be effected by a special resolution and the increase effected by one more resolution. If, however, the Articles carry such a power the increase of the share capital can be effected by only one special resolution. The consolidation of the share capital with a view to

issuing shares of larger amount and conversion of all or any of the paid-up shares into stock or reconversion of stock into paid-up shares may also be similarly effected.

With regard to the sub-division of shares into shares of amounts smaller than what is fixed by the Memorandum, it is provided that this power can be exercised by a special resolution. The cancellation of shares is not to be treated as a reduction of capital and can be also effected if the Articles allow without a special resolution.

### **Reduction of Share Capital**

The Companies Act lays down the following rules with regard to reduction of capital :—

(1) Subject to confirmation by the court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act called a resolution for reducing share capital (Sec. 55).

It will be seen from the above that where power to reduce capital under the above circumstances is given in the Articles one special resolution is necessary to put that power into effect. If nothing is stated about the reduction in the Articles, the articles would have to be altered by a special resolution and then a further special resolution would have to be passed to effect the reduction. It will also be noticed here that a confirmation by the court is also necessary. In case of the reduction it may be further added that the court may order the words "and reduced" to be added to the name of the company for such period as to the court it may seem just. The court would confirm reduction where it does not involve the diminution of any liability in respect of unpaid share capital. Besides, the requirement as to adding the words "and reduced" may in this case be dispensed with altogether, at the option of the court. In one case, this was dispensed with on the ground that the use of the words would prove injurious to the company.

If reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up capital, every creditor of the company who, at the date fixed by the court, is entitled to any debt or claim which, if that date

were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction (Sec. 58, sub-sec. 1)

The court shall settle a list of such creditors, and any of the creditors who is entered on such a list and whose debt is not discharged or determined may claim to be paid out. After being satisfied that every one of such creditors has consented to the reduction or his claim or debt has been discharged, determined or secured, the court may pass an order confirming the reduction.

### UNLIMITED LIABILITY OF DIRECTORS

A limited company, if so authorized by the Articles, may, by special resolution, alter its Memorandum so as to render unlimited the liability of its directors or of any director (Sec. 71). It may be added here, that any limited company may provide for the directors' liability to be unlimited by the insertion of a clause to that effect in the Memorandum from the very commencement. In such a case it is expected that before a person accepts the office of a director or acts therein, a notice in writing to the effect that his liability would be unlimited, should be given to him either by the person who proposes him for election or by any of the promoters or officers of the company. In actual practice this section is practically of very little importance as seldom a company under modern circumstances is incorporated either with unlimited liability of directors or with that of its members.

Each of the subscribers to the Memorandum should sign in the presence of at least one witness who shall attest it with his signature. The duties of these subscribers shall be (1) to sign the Articles of Association of the company, (2) to appoint the directors or act as directors themselves unless prohibited by Articles and (3) to pay for their shares.

### ARTICLES OF ASSOCIATION

The Memorandum of Association is generally accompanied by the "Articles of Association." These Articles of Association are the by-laws of the company governing its management and embodying the powers of the directors and officers of the company as well as the powers of the shareholders as to voting, etc. The Articles of Association are not compulsory, and a company may be formed without possessing its special Articles of Association. In such a case the schedule which is attached to the Companies Act called the "Table A" becomes the Articles of Association of the company. When however, a company possesses its specially framed Articles of Association but the Articles are silent on some of the points of management, etc. the clauses relating to these points in the "Table A" come into operation. There are instances where some companies do not frame their

own Articles of Association but they draft a few special rules and for the rest provide that "the Table A shall be the Articles of Association of this company excepting so far as they are modified by the following rules". Nowadays, however, company management and work have become so complicated that it is quite difficult, if not impossible, for a company of any magnitude and importance to appropriately adopt "Table A" as its Articles of Association and, therefore, the student may take it that ordinarily every company of importance gets its own "Articles of Association" specially framed.

In framing these Articles of Association care must be taken to see that the regulations framed do not go beyond the powers of the company itself as contemplated by the Memorandum of Association, nor should they be such as would violate any of the requirements of the Companies Act itself/c.g. if power was to be given to a company in its Articles to purchase its own shares, or to issue shares at a discount, such powers would violate the enactments contained in the Companies Act itself and are for that reason void.

The Articles of Association form a sort of covenant between the members of a company which binds the members to the company. Between individual members, however, there is no contract. As, for example, in one case where two members of a company sued the directors with a view to compel them to make good the losses sustained by the company through the directors' fraudulent acts, the court refused to intervene on the ground that these two members could not sue in their individual capacity but only the shareholders as a body could sue. The ground on which this was done was that as the acts were capable of confirmation by the majority, that majority was free either to compel or condone the payment of these losses. In other words, an individual member has no right to sue a director for a breach of regulation. On the same principle a clause in the Articles that a promoter shall be paid a certain amount does not give that promoter a right to sue the company. (*Foss v. Harbottle*, 2 Hare 461; *In re Rotherham Chemical Co.*, 25 Ch.D. 103.)

The Articles of Association of a company may be altered by a special resolution either by way of deduction, addition or substitution. The only provision being that the alteration should not contravene any of the provisions of the Act or of the Memorandum of Association of the company concerned. It has also been laid down that every person who deals with a company is expected to have ascertained the contents of its Articles and to have acquainted himself of any limitation contained therein. His contracts, therefore, with the company would be construed on that supposition. [*Royal British Bank v. Turquand*, (1856) 6 E. and B. 327.]

It may be added that a company is bound to send to every member, if so requested, a copy of its memorandum and articles of association. It may make a small charge not exceeding one rupee

Failure to comply with this regulation would entail a fine of not more than Rs. 10, for each offence (Sec. 25).

### Misrepresentation in the Prospectus

The law with regard to misrepresentation in the prospectus is stated in Sec. 100 of the Act as follows :—

(1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

- (a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true;
  - (b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and a fair copy of or extract from the report or valuation: Provided that the director, person named as director, promoter or person who authorized the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and
  - (c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document;
- or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

The misrepresentation must, of course, be of fact—not of law—and must be a material one on which the person applying for shares

alleged when he made his application. If the whole prospectus is of a nature, where, if a number of statements were to be taken together would create a false impression, it is held to be none the less false though it may not be possible to show any specific statement as untrue. The applicant must, within a reasonable time of his coming to know of the false statement, apply for his remedy, otherwise he would be deprived of it. Of course, the right to the rescission of shares and compensation which such a misrepresentation gives, will be lost if the company goes into liquidation as the rights of creditors would then intervene. It should also be noted that only those shareholders who relied upon the statements in the prospectus when they applied for their shares are entitled to the relief laid down and, therefore, those who bought the shares from some other shareholders cannot claim their relief as they are not parties to the misrepresentation. This is on the principle that the office of the prospectus is exhausted when once the allotment is made. (*Peck v. Gurney*, (1874) L.R. 6 H.L. 377-411.) Omission of material facts in some cases amounts to misrepresentation. But the omission should be such as would make the prospectus misleading. (*Aaron's Reef v. Twiss*, (1896) A.C. 273.)

### Commencement of Business

A company shall not commence business or exercise any borrowing powers, unless (1) the shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less than the amount of minimum subscription; (2) every director of the company has paid in cash his proportion payable on application and allotment of the shares taken or agreed to be taken by him in the case of a company offering its shares to the public, (3) a duly verified declaration is filed with the registrar by the secretary or one of the directors to the effect that the above conditions have been complied with; and (4) in the case of a company which does not issue a prospectus inviting the public to take shares, there has been filed with the registrar a statement in lieu of prospectus. The registrar will, on the filing of such a verified declaration, certify that the company is entitled to commence business, which certificate shall be conclusive evidence that the company is entitled to commence business (Sec. 103).

It may be added here that the company must commence business within one year of its incorporation, otherwise the court may order it to be wound up (Sec. 162). When a company enters into contracts after incorporation but before it is entitled to commence business such contracts are only provisional and would bind the company only after it is entitled to commence business. Thus in one case (*Otto Electrical Mfg. Co.*, (1906) 2 Ch. 390) it was laid down that if a company went into liquidation before it was entitled to commence business all who had supplied goods or rendered services to the company could not recover.

## APPLICATION AND ALLOTMENT OF SHARES

An application for shares is an offer which is accepted by sending out a letter of allotment, thus constituting a binding agreement. Neither the application nor the allotment need be necessarily in writing. All the rules with regard to offer and acceptance as dealt with in the chapter on Contracts would apply to the application and allotment of shares.

It may be added that in practice the applications are in writing and for that purpose specially printed forms are issued with the prospectus which are to be filled in and signed by the applicant. We have seen that the directors can proceed to allot shares if the minimum subscription is applied for and not otherwise unless the company is a private company. If no amount is fixed for such a minimum subscription either by the memorandum or the articles, then when the whole amount of the share capital offered for subscription has been subscribed and the application amount has been paid to the company in cash. This amount on the application of shares shall not be less than 5 per cent of the nominal amount of the share. If these conditions are not complied within one hundred and twenty days of the issue of the prospectus, all money received from the applicants should be returned to them forthwith without interest. If any such money is not returned within one hundred and thirty days of the issue of the prospectus, interest at the rate of 7 per cent would run from the last mentioned day for which all the directors of the company shall be jointly and severally liable (Sec. 101).

Another point with regard to allotment is whether the directors are bound to sell the shares above par, i.e., at a premium, if such a premium, is available. It appears that there is no such liability on the directors so long as they do not allot the shares either to themselves or to their friends at par when a premium price is available. As long as they allow all the shareholders to take the benefit of the premium amount by offering shares to the public at par, there is no objection to a sale at par. If not, they should secure the benefit of the premium for the company. (*Yorkshire & North Midland Railway Co. v. Hudson* (1853) 20 L.J., Ch. 539.)

### Allotment or Transfer to a Minor

A contract to take shares by minors is voidable, and therefore, care should be taken not to allot shares to minors. From the minor's standpoint, however, there is no objection to his becoming a member and holding shares either through subscribing to the memorandum of association or getting the shares transferred to his name. If any director knowingly allots shares to minors he will be liable to make good any loss that may arise to the company. (*In re Crenner & Wheel Abraham United Mining Co.*, (1872) 8 Ch. App. 45.)



## DIRECTORS

### Definition

A joint-stock company usually carries on business through the medium of "directors" who control the company's management. The actual management is generally vested in a special officer called the "manager" and when that officer also happens to be a director, he is known as the "managing director." The Indian Companies Act defines the director as including "any person occupying the position of a director by whatever name called" (Sec. 25). Thus, it is the function and not the name that matters. (*In re Forest of Dean Coal Mining Company*, (1878) 10 Ch.D. 450.)

### Their Appointment and Qualification

According to the Indian Companies (Amendment) Act of 1936, every public company registered after the commencement of that Act, is compelled to have at least three directors. In English law a public company, registered after the Companies Act of 1929 came in force, must have at least two directors. A private company of course need not have directors at all if it so chooses. In such cases all members of a private company might carry on the business, or there might be what is commonly called a "Council." It is, however, the practice in the case of all joint-stock companies whether in India, or in England, public or private, to appoint a board made up of men of position and experience to act as directors. The first directors are generally appointed by the promoters and it is not unusual to find a promoter appointing himself as a director. Usually the current practice is to name the original directors in the articles. This has now become universal because it is very convenient and saves an amount of unnecessary trouble and expense. It should be followed in the case of every modern company. If that is not done, the first members or subscribers to the memorandum of association act as directors until a meeting of shareholders appoints directors.

The subsequent directors are appointed by members in general meeting, but in case any casual vacancy occurs during the interval, it shall be filled in by the board of directors itself.

It may be noted that according to Sec. 83B (2) of the Indian Companies (Amendment) Act of 1936, 'notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation. This provision shall not apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles the company the number of directors whose period of office is

liable to determination at any time by retirement of directors in rotation, falls below the two-thirds proportion mentioned in this section.'

The object of this addition was to provide for not more than one-third of the total number of directors being nominated or appointed by managing agents. As it was thought doubtful later whether this Sec. 83B (2) would achieve that objective, a further section was added, viz. Sec. 87 (I) which clearly lays down that notwithstanding anything contained in the articles of a company other than a private company the directors, if any appointed by the managing agents shall not exceed in number one-third of the whole number of directors.

### Assignment of Office of Directors

Now the assignment of office of directors is prohibited by our Indian Companies Amendment Act of 1936 following a corresponding section in the English Companies Act of 1929. The section lays down that if in the case of any company a provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of a company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall notwithstanding anything to the contrary contained in the said provision be of no effect unless and until it is approved by a special resolution of the company (Sec. 86B).

### Alternate or Substitute Directors

However, the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section.

Of course any such alternate or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which the meetings of the directors are ordinarily held. It will be thus seen that temporary appointments of substitute directors do not constitute an assignment of office within the meaning of this section, when made with the approval of the board of directors.

### Debenture Directors

There are also cases where debenture holders or some other outside body is empowered to attend or nominate directors, and in such cases the nomination of such a body will in itself be sufficient and no further act on the part of the company will be necessary. (*British Mercantile Syndicate v. Alington Rubber Co.*, (1915) 2 Ch. 186) If, however, the arrangement is that this outside body is to nominate and the company is to appoint them, of course the appointment by the

company would be necessary. (*Plantations Trust v. Bils (Sumatra) Rubber Lands*, (1916) 85 L.J. Ch. 801.)

### Vacation of Office of Director

Formerly under the old Act the office of directors was to be vacated only if a clause to that effect appeared in the articles of association but now there is a section in the new Indian Act which clearly lays down the circumstances under which the director vacates his office. This section 86 (I) lays down that the office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of Section 85, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment; or

(b) he is found to be of unsound mind by a Court of competent jurisdiction; or

(c) he is adjudged an insolvent; or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors; or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of Section 86D; or

(h) he acts in contravention of Section 86F.

The above grounds are the grounds specially laid down by the section but the section further lays down that nothing contained in this section shall be deemed to preclude a company from providing in its articles that the office of the directors shall be vacated on grounds additional to those specified in this section [Sec. 86 (I) (2)].

### Bankrupt Directors, Managers & Managing Agents

Following a corresponding section of the English Act it has now been laid down specifically by Sec. 86A in addition to the provision of disqualification as provided for by Sec. 86 (I)(c) that if an undischarged insolvent acts as a director or managing agent or manager of any company he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding Rs. 1,000 or to both. This section covers companies incorporated both within British India and outside British India.

### Qualification of Directors

It may be mentioned here that the number of shares, which is to be the qualification of a director, is laid down in the articles of

association of every company, and, therefore as soon as a person is appointed a director, he ought, within two months of his appointment, to obtain his qualification shares, otherwise his office should be vacated. The articles of association of some companies provide for a period even shorter than two months. The term "directors" indicates that they are to direct and manage the company. Though in the Companies Act the word "directors" is used, they may be called by any other term so long as they are to perform the usual function of directors as generally understood. The articles may give special powers to one or more of its directors by styling them managing directors. An individual or even a firm or a limited company may be appointed as one of the directors of a company. (*Bulawayo Market and Offices Co.*, (1907) 2 Ch. 458.)

Cozens-Hardy, L. J., in *Automatic Self-cleaning Filter Co. v. Cunningham*, (1906) 2 Ch. 34, said: "I do not think it is true to say that the directors are agents. I think it is more nearly true to say, that they are in the position of managing partners, appointed to fill that post by mutual arrangement between all the shareholders." The position of directors no doubt resembles that of managing partners in some respects but they have not all the powers of managing partners. In some sense they are agents or trustees of the company. They are agents of the company in so far as they can within their powers and constitution of the company enter into contracts on behalf of the company. Their functions resemble those of trustees in so far as the assets and property of the company which come into their possession. They are not to make secret profits out of the company, taking advantage of their position as directors of the company. Nor should they enter into contracts with the company on their own behalf or on behalf of some other company of which they are directors unless sanctioned to do so by the articles of the company in general meeting. (*North-West Transportation Co. v. Beatty*, (1881) 12 App. Cas. 589.)

### Their Remuneration

The remuneration of directors is regulated by the articles of association of the company. The directors are not entitled to be paid, out of the assets of the company, their travelling expenses incurred in attending board meetings, if there is no provision in the company's articles to that effect. The directors are entitled to their remuneration irrespective of profits or losses made by the company unless expressly provided otherwise. With respect to the remuneration due to them, the directors rank as ordinary creditors of the company. (*In re New British Iron Co.*, ex parte *Beckwith*, (1898) 1 Ch. 324.) The peculiarity to be noted in connection with the remuneration of directors is that unless the articles of association fix their remuneration, they are not entitled to a remuneration as of right. If the articles fix it then on their rendering the requisite service they can claim it as a debt due.

to them. If, on the other hand, the articles are silent on this point the company in its general meeting may vote a remuneration, but such a remuneration is merely a gratuity and not one that can be enforced as a matter of right. (*Geo Newman & Co.*, (1895) 1 Ch. 674.) The most popular method of paying remuneration is a fee for every meeting attended. Sometimes it takes the form of a commission paid upon the profits made by the company. In this case, it will not include the profits made on the sale of the whole undertaking of the company. (*Frames v Bultfontein Mining Co.*, (1891) 1 Ch. 140.) If the fees are to be paid at so much a year, or where a lump sum is paid yearly to all the directors, the director who has not served for a complete year is not entitled to be paid anything. If, however, the remuneration is to be paid "at the rate of" so much a year, the director who has served for less than a year would be entitled to claim his proportionate fee. It has also been decided that the directors are not entitled to receive their remuneration free of income-tax.

### Their Rights and Duties

We have noticed that the directors of a company are virtually the company's managers or agents, appointed to act in the interests of the members of the company and stand in what is known as a **fiduciary position**, and, therefore, they should not make any undisclosed profits through their office of directors. It is also held to be illegal for a director to acquire his qualification shares as a present from the vendor or founders of the company. They have to act within the powers given to them and if they exceed their powers the company may ratify their acts, if such acts come within the powers of the company itself. Of course, a company cannot ratify acts of the directors which are beyond the company's power, i.e. *ultra vires* the company.

So long as the directors act honestly, they are not responsible for damages unless they have been guilty of **gross negligence**. They would, of course, be liable for **misfeasance** and **fraud**. Innocent directors would not be liable for the fraud of their co-directors, if the books of accounts of the company have been kept and audited by duly appointed auditors, and if they did not know of the fraud and had no reason for suspecting it.

The directors have also the right to appoint the first auditors of the company, but the subsequent auditors are appointed by the members of the company in general meeting. The directors are bound to give all information to the auditors as may be required by them in the course of the examination of accounts.

### DIRECTORS OBLIGATORY

[ (1) Every company shall have at least three directors ]

(2) This section shall not apply to a private company (except a private company being a subsidiary company of a public company) (Sec. 22A).

## APPOINTMENT OF DIRECTORS

(1) In default of and subject to any regulations in the articles of a company other than a private company—

- (i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed;
- (ii) the director of the company shall be appointed by the members in general meeting; and
- (iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.

[2] Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation.

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment), Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section | (Sec. 83B).

The Act further states that it shall be the duty of every director to obtain his qualification shares as stated in the articles within two months of his appointment or in such shorter time as may be fixed by the articles: in case he does not possess those shares and in case of his failing, to do so his office shall be vacated and if he still acts as a director he is liable to be fined (Sec. 85).

From this it follows that the Act does not make it compulsory for a director to hold any particular number of shares as his qualification unless the articles of association of that particular company lay down that the qualification of a director shall be so many shares. Section 86 provides that—

The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

Thus even any irregularity in appointment or delay in taking up the qualification shares would not, in the absence of notice of such a defect, invalidate the acts of the director in question.

The directors can do all that is fairly incidental to the carrying on of the business of the company. Their powers may be limited or extended within the objects and constitution of the company by the Articles of Association. They can delegate their powers to managing directors or committees if so authorized by the Articles. We have already seen how the articles themselves can limit the powers of individual directors... We have seen that the directors should not

enter into contracts with the company in person or enter into contracts with a company in which they are personally interested, unless authorized to do so by the articles of the company. Sections 91A and 91B provide to the effect that—

**Section 91A.**—(1) Every director, who is directly or indirectly concerned or interested in any contract or arrangement entered into by, or on behalf of the company shall disclose the nature of his interest at the meeting of directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement:

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction, be sufficient disclosure within the meaning of this sub-section, and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to fine not exceeding one thousand rupees.

[(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.]

[(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.]

**Section 91B.**—(1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested (nor shall his presence count for the purpose of forming a quorum at the time of any such vote); and if he does so vote, his vote shall not be counted. Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them suffer by reason of becoming or being sureties or surety for the company.

The contravention of the provision of the above section also leads to a fine not exceeding one thousand rupees.

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.

It may be added that this prohibition does not prevent a director from voting as a shareholder at a general meeting. The directors of an insolvent company cannot exercise their powers with a view to benefit themselves in view of the approaching winding up. (*Syke's case*, (1872) L.R. 13, Eq. 255.) The liability of directors participating in secret profits and breaches of trust is joint and several. (*In re Carriage Co-operative Supply Association*, (1884) 27 Ch.D. 322.)

With regard to negligence on the part of directors, a distinction is made between negligence proper, which means want of due care

and diligence, and error of judgment, which does not fall under the description of negligence. Negligence on the part of a director does, no doubt, make him liable to make good the money which the company may have lost through negligence proper. It was laid down in one case, that if a director neglects enquiry and trusts his co-workers (directors) he does so at his own risk. But if the directors relied on the officers of the company whom they are entitled to trust and whose statements misled them, they will be protected. They should, however, act like men of ordinary prudence acting on their own behalf, otherwise they would be guilty of negligence. Where the articles of association permit, the directors may appoint a managing director from among themselves. The managing director will not be subject to retirement by rotation and his salary or remuneration may be fixed by the board of directors. There is nothing to prevent the company in a general meeting from appointing a general manager if the powers are reserved for such a meeting; but if the powers have been given to the directors, the general meeting has no power to appoint a managing director and in that case the appointment must be made by the board of directors themselves.

Besides being agents of the company the directors, as we have seen, stand to a certain extent in the relation of trustees to the company and, therefore, if they exercise any of their powers in opposition to the interests of the company, that would constitute a breach of trust, making them liable to make good the damage suffered by the company by any act done on their behalf. This breach of trust may arise from misfeasance, i.e. through a breach of duty as where though they do not actually misapply the funds of the company their conduct is of a nature which constitutes a loss through a breach of duty on their part, i.e. where they allot shares to an infant, or take bribes, it would be a misfeasance amounting to a breach of trust. A breach of trust pure and simple arises where they misapply the money of the company. All the directors who are implicated in such misfeasance will be liable, but a director who does not take part in it and who does not expressly or impliedly connive at such a misfeasance is not liable.

The Company Law provides for punishment in cases where in any writing, report or certificate of balance sheet or other documents required by or for the purpose of the Companies Act any mis-statement is wilfully made on a material particular. The punishment is to extend over a term of three years, and may be of any description (Sec. 282). It has also been held that the directors are also criminally liable, under the Indian Penal Code, if they submit a false balance sheet thereby creating a wrongful gain for themselves or wrongful loss to others. If, however, where a director of a company is found guilty of negligence or breach of trust and the court thinks that though the director may be liable in respect of such negligence or



breach of trust he has acted honestly and reasonably and should, therefore, be excused, the court has ample discretion to give him release wholly or partly (Sec. 281).

### Summary from the City Equitable Case

The following summary as to the rights and duties of directors as taken from the judgment of Romer, J., *In re City Equitable Fire Insurance Co., Ltd.*, (1925) 1 Ch.D. 407, is important.—

(1) Directors have a discretion as to the manner in which the work is distributed between their board and the staff.

(2) Directors are not expected to display a greater degree of skill than may be reasonably expected from persons of their skill and experience though they must discharge their duties honestly and with reasonable care.

(3) Directors are not liable for mere errors of judgment.

(4) Directors' duties are of an intermittent nature. They are not bound to give continuous attention.

(5) In case of duties assigned to certain officials they are, in the absence of grounds of suspicion, justified in trusting those officials.

(6) Directors shall see the company's money in proper state of investment.

(7) Directors and other officers are entitled to be indemnified by the company against all costs, losses and expenses incurred by them in discharge of their duties except such as happen from their own wilful or wrongful act or default.

### MEETINGS OF DIRECTORS

The regulations as to the meetings of directors are to be found in the Articles of Association of all companies. The meeting of directors should be regularly convened; i.e. due notice should be given to all directors, otherwise the business put through at an irregularly convened meeting is invalid. This rule as to notice, of course, does not apply to an adjourned meeting. The Articles of Association generally fix a quorum failing which a majority of the board must meet. (*York Tramways Co. v. Willows*, (1874) 8 Q.B.D. 685.) In one English case, however (*Peruvian Railways Co., ex parte International Contract Co.*, (1868) 19 L.T. 803) the court refused to declare a resolution invalid on the ground of its having been passed by a lesser number than a quorum of directors on the ground that the smaller number was established as a quorum by the practice of the board because in this case the number that passed the resolution in question had acted as a quorum for six years. The Articles of some companies prescribe that a document signed by all the directors shall be as effective as a resolution of the board. In the absence of such a provision the directors must meet in order to be able to act. (*D'Arcy v. Tamar Hill Railway Co.*, (1867) L.R. 2 Ex. 158.) It is, however, doubted if this passing of a resolution by means of a letter or a circular signed by all the directors, even though supported by articles, is regular and within the contemplation of the Companies

Act. Fry, L. J., in *Portuguese Copper Mines*, (1889) 42 Ch.D. 160. threw considerable doubt on the validity of the practice, as, according to his Lordship, without a meeting the directors cannot think. We have already seen that the validity or otherwise of a director's appointment, if not known or noticed, does not affect the validity of the transaction passed at a meeting by him. The next point to be noticed is that proper minutes of the meetings of the directors are to be entered in books kept for the purpose. The Companies Act, Section 83, lays down as follows:—

"(1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for the purpose.

"(2) Any such minute, if purporting to be signed by the Chairman of meeting at which the proceedings were had, or by the Chairman of the next succeeding meeting, shall be evidence of the proceedings.

"(3) Until the contrary is proved, every general meeting of the company or meeting of directors, in respect of the proceedings whereof minutes have been so made, shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid."

It may be further added that the directors cannot exclude one of their number from acting at their meeting unless the company has by a resolution declared that it does not desire the particular director to act. (*Bainbridge v. Smith*, (1889) 41 Ch.D. 162-74.) The excluded director may, however, move for an injunction restraining his continued exclusion.

It is the usual practice of the board of directors to delegate their powers to a committee appointed from among themselves or to managers or officers. When the Articles specifically delegate that power, the board of directors can, even by a quorum of one, delegate the powers to a committee of one. (*Umney v. Fireproof Doors Ltd.*, (1916) 2 Ch.D. 142.)

## MEMBERSHIP OF A COMPANY

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company and on its registration shall be entered as members in its register of members ;  
 (2) every other person who agrees to become a member of the company and whose name is entered on the register of members, shall be a member of the company (Sec. 30).

Thus, it would be noticed, that a person can be enrolled a member either by signing a Memorandum of Association, or by making an application for shares which are allotted, or by getting the shares transferred to him from some other member, or, as in some cases, he may make himself a member by estoppel in liquidation by allowing his name to remain on the register of members, by giving

the public an impression that he was a member in some other manner. It is easy to notice how a person can cease to be a member. A person can cease to be a member by getting his name removed from the register, or by selling his shares, or by forfeiture, or surrender, or rescission on the ground of misrepresentation in the prospectus, or on the ground of irregular allotment of the shares, e.g. where the minimum subscription had not been applied for. Both an individual as well as a joint-stock company may be admitted members. A company which is a member of another company may, by a resolution of the directors, authorize any of its officers, or other person, to act as its representative at any meeting of that other company when the person so authorized shall be entitled to exercise the same powers on behalf of the company, which he represents, as if he were an individual shareholder of that other company (Sec 80).

With regard to the liability of members in respect of reduced shares, the law lays down that—

(1) A member of the company past or present shall not be liable in respect of any share in any call or contribution exceeding in amount the difference (if any) between the amount paid or (as the case may be) the reduced amount if any which is to be deemed to have been paid, on the shares and the amount of the shares as fixed by the minute.

Provided that if any creditor entitled in respect of any debt or claim to object to the reduction of share capital is by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim not entered on the list of creditors and after the reduction the company is unable within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim then—

- (i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration, and
  - (ii) if the company is wound up the Court on the application of any such creditor and proof of his ignorance as aforesaid may, if it thinks fit settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in winding up.
- (2) Nothing in this section shall affect the rights of the contributories among themselves (Sec 63)

The liability of members in case of liquidation is laid down as follows —

(1) In the event of a company being wound up, every present and past member shall subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):

- (i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;
  - (ii) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
  - (iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
  - (iv) in the case of a company limited by shares, no contributions shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member;
  - (v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;
  - (vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;
  - (vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in case of competition between himself and any other creditor not a member of the company; but any such sum be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves.
- (2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him (Sec. 156).

A person does not become a member with a member's liabilities simply because his name was entered on the register as the holder of shares allotted to him though he never applied for them nor accepted them. Here even though a winding up were to have supervened, he can get his name removed from the register. (*Irnot's case*, (1887) 36 Ch.D 702, C.A.) What is required is an agreement to take shares either express or implied. We have seen that a company cannot issue its shares at a discount and, therefore, if a person were to enter into an agreement with a company to purchase its shares at a discount he cannot enforce the agreement against the company. (*In re Almada & Tuito Co.*, (1888) 38 Ch.D. 415, C.A.) If these shares are entered in the register in his name and he acts as a holder he will be taken to have agreed to pay for these shares in full. (*In re Addlestone Linoleum case*, (1887) 37 Ch.D 191, C.A.)

Every company shall keep in one or more books a register of members in which particulars as to names, addresses and occupations of members, together with a statement of shares held by such member,

the distinguishing number of each share and the consideration agreed to be paid or paid must be entered. Also the date on which he was admitted a member and the date on which he ceased to be a member should be stated (Sec. 31). Besides this, every company having a share capital shall **once at least in every year** make a list of all persons who on the day of the first or only general meeting in the year are members of the company, and of all persons who have ceased to be members since the date of last return or (in case of the first return) of the incorporation of the company (Sec. 32).

No notice of trust, expressed, implied or constructive, shall be entered on the register, or be received by the registrar (Sec. 33). The object of this is to relieve the company from the complications arising from equitable titles or interests of persons in shares. The register of members has to be kept at the registered office of the company and shall be open during business hours to the inspection of any member gratis and to others on payment of one rupee or a lesser sum, except when closed under the provisions of the Companies Act for payment of dividends, etc.

A copy of the register, if required by a member or an outsider, must be furnished at a charge of six annas per every hundred words (Sec. 36). Where a person is fraudulently, or without sufficient cause, entered or omitted from the register of members, an application may be made to the court by the aggrieved party for rectification of the register (Sec. 38). The register of members is *prima facie* evidence of any matters directed or authorized by the Act to be inserted therein (Sec. 40).

A company with a share capital must keep a branch register of members in the United Kingdom which, under our Act, would be known as a British Register. This British Register must be kept in the same manner as the principal register and shall be a part of the same. The company shall transmit to its registered office in India a copy of every entry in its British Register as soon as it is made and this should be entered in the duplicate British Register kept at the registered office as a part of the principal register.

## SHARES

'Share is defined by the Indian Companies Act as "a share in the share capital of the company, and includes stock except when a distinction between stock and share is expressed or implied" [Sec. 2 (16)].

Farewell, J., defines a share in *Borland's Trustees v. Steel Brothers & Co.*, (1901) 1 Ch. 288, as "A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*. A share is not a sum of money, but is an

interest measured by a sum of money, and made up of various rights contained in the contract."

The share or a similar interest of a member in a company is **personal estate** which can be transferred as such in the manner provided by the Articles of the company. Each share in a company, having a share capital, shall be distinguished by its appropriate number (Sec. 28). A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified (Sec. 29). It may be added that when a person holding a number of shares in a company wishes to transfer a part of his holding, the practice is to lodge the share certificate with the company and to get the transfer certified by an officer of the company with words to the effect "certificate lodged". This does not warrant the title of the holder nor deprive the board of directors of their right as per Articles to decline to admit the transferee as a member of the company. A company limited by shares, if so authorized by its Articles, may, with respect to any fully-paid shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of future dividends on the shares or stock included in the warrant; such warrants are termed **share warrants**. These share warrants may be transferred by delivery (Secs. 43 & 44). The holder of the share warrant shall be entitled, if provided for by the Articles, to surrender it for cancellation and to get his name entered as a member in the register of members (Sec. 45). The holder of a share warrant may, if the Articles provide, be deemed to be a member of the company within the meaning of the Act, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the Articles (Sec. 46). **Share or shares held by a lunatic** can be transferred by an order in lunacy by the person or persons named in the order. **Share or shares standing in the name of a married woman as part of her separate property** can be transferred by her without the concurrence of her husband. **Shares standing in the name of an insolvent** may be transferred by his trustee in insolvency or the Official Assignee acting as such. On the death of a shareholder, the title to shares held by him in his own right passes to his legal personal representative who can transfer the shares subject to the provisions of the Articles.

### Different Classes of Shares

The shares of a company may be either—

- (1) *Preference Shares* and these preference shares also carry the further privilege of being cumulative.

(2) *Ordinary Shares.*

(3) *Founders' or Deferred Shares.*

### PREFERENCE SHARES

These are shares the dividend on which is "preferred", i.e. the agreement is that out of the available profits made by a company during any year, the first dividend of a certain percentage, as agreed, is to be paid to holders of preference shares, before any dividend can be paid to the holders of ordinary or founders' shares. If the preference shares carry what is known as "simple" preference, that gives the holders a right to claim a fixed percentage or dividend, out of the profits of each year and, therefore, if during any year there are no profits available for dividend, the preference shareholders do not get any dividend during that year, nor can they claim the dividend, not so paid, out of the profits of any subsequent year.

*Cumulative preference shares*, however, carry an additional right under which dividends, not paid during any year owing to the insufficiency of profits, accumulate to be paid during any subsequent year when the available profits are sufficient.

It may be further mentioned here that the preference right given to the shareholders is a preference towards the payment of profits, i.e. dividends. There are cases, however, where a preference right is also extended to the repayment of capital in case of liquidation. In such cases, after all the creditors of the company are paid out and a surplus is left, that surplus is to be first utilized towards the repayment, in full, of such preference shares before anything can be paid to the ordinary or deferred shareholders towards the value of such shares.

### REDEEMABLE PREFERENCE SHARES

Under the new Act a new type of shares is now allowed to be issued under certain conditions and these shares are called redeemable preference shares. The law lays down that subject to the provisions of Sec. 105B, a company limited by shares may, if so authorized by its Articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed. This is subject to the conditions that (a) no shares are to be redeemed except out of the profits of the company which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purpose of the redemption, or out of sale proceeds of any property of the company; (b) no such shares are to be redeemed unless they are fully paid; (c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, the company must, out of the profits which would otherwise have been available for dividend, transfer to a reserve fund, a sum equivalent to the amount applied in redeeming the shares. This reserve fund is to be called "Capital

**Redemption Reserve Fund**" and the provisions of the Act relating to the redemption of the share capital of a company, except as provided in this section, shall apply as if the capital redemption reserve fund were the paid-up share capital of the company, and (d) where any shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed. Besides this, a further condition in connection with such issue is that in every balance sheet of a company which has issued redeemable preference shares, a statement shall be included specifying what part of the issued capital of the company consists of such shares and the date on or before which these shares are, or are to be, liable to be redeemed or where no definite date is fixed for redemption, the period of notice to be given for redemption. Failure to comply with the provisions of this sub-section (2) of Sec. 105B shall entail on the company and every officer of the company, who is in default a fine not exceeding Rs. 1,000. The redemption of these preference shares may be effected on such terms and in such manner as may be provided by the Articles of the company subject to the provisions of Sec. 105B. The further power given is that where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fee as payable under Sec. 249 be deemed to be increased by the issue of shares in pursuance of sub-section (4) of Sec. 105B. Where, however, the new shares are issued before the redemption of the old shares, the redeemed shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of sub-section (4) of Sec. 105B unless the old shares are redeemed within one month after the issue of the new shares. Where these new shares have been issued in pursuance of Sec. 105B (4), the capital redemption reserve fund may be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

### ORDINARY SHARES

These are shares which, in cases where there are preference shares also, receive their dividend out of profits, after the preference shareholders are paid their dividends as per rights given to them by the regulations of the company. In the absence of there being deferred or founders' shares the ordinary shareholders have a right to share all the profits left after the payment of the preference shareholders, and after due provision is made by the directors for depreciation, reserve fund, etc,



### FOUNDERS' OR DEFERRED SHARES

These are sometimes issued in limited numbers, which carry a right to dividend, after a fixed percentage is paid to the preference and ordinary shareholders, respectively. Generally, holders of founders' shares are entitled to a division among themselves of the whole or proportionate profit left after the payment of dividends to the first two classes of shareholders named, of course after all due provision is made by the directors, as per regulations of the company. These shares came to be called founders' shares because they were originally created to remunerate the founders of the company whose rights were deferred to the other classes of shareholders. In actual practice it was noticed later that in certain speculative concerns, such as mining companies, the founders' shares earned large profits. It is, therefore, the modern practice to allot founders' shares only to those who apply for a certain number of ordinary or preference shares with a view to attract capital in concerns where such founders' shares are considered a good investment.

### DISTINCTIONS BETWEEN STOCK AND SHARES

Distinctions between stock and shares in a joint stock company are the following :—

(1) The shares may not necessarily be fully paid but are generally payable in instalments known as application money, allotment money, first call money, etc., whereas the stocks are always fully paid up.

(2) The shares are transferable in full, whereas the stock may be divided into fractional parts and are transferable in multiples as may be laid down by the regulations of the company.

(3) All the shares are known by their distinctive numbers but such a regulation does not apply to stock.

It may be mentioned here that any company with its capital divided into shares may convert any portion of its fully paid share capital into stock and give notice of such conversion to the registrar. The register of members would, in such a case, show the amount of stock held by each member, instead of the amount of shares, with all the particulars relating to the holder of such stock as in the case of the share register.

### THE SHARE CERTIFICATE

After allotment the share certificate has to be prepared within a reasonable time and exchanged against allotment letter or receipts of deposits on account of shares. We have seen that "A share certificate under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified" (Sec. 29). Thus the company is stopped from denying to the innocent holder who has bought shares relying on the certificate *bona fide* that the

statements contained in the certificate are untrue ; e.g. that the shares were not fully paid though the certificate stated them to be fully paid.

We have seen that in accordance with Section 31 the company is bound to keep a register of members and enter in the register the names, addresses and occupations of all the members and, in case the company has a share capital, it should also contain a statement of shares held by each member together with the amount paid and payable by each. In addition it must contain a statement as to the date of admission of a member and also that of his ceasing to be a member. No company can, of course, buy its own shares (Sec. 55).

### Transfer of Shares

A shareholder has the right to transfer his shares or any other interest in the manner provided by the Articles. The shares are movable property (Sec. 28). This transfer is easily effected through filling in and signing of the transfer form. This transfer form may either be a special form provided for the company or the forms obtainable at stationers. The usual practice is to provide for a special form. The transfer form has also to be signed by the transferee. According to the usual custom of stock exchanges, when a share is sold on the market, the transferor fills in and signs a transfer form and hands it over together with the share certificate to the transferee. The transferee then lodges this transfer with the share certificate, at the office of the company, and the secretary of the company brings the said application for the transfer before the board meeting of the directors. It has been held that, unless the directors have the power to refuse to register a member specially reserved to them by the Articles, this transfer must be registered at the earliest moment of time.

The directors cannot refuse a transfer to all comers because if they did so they would be abusing their powers. The power to reject transfers is a trust to be exercised for the benefit of the company and should be exercised *bona fide* without being oppressive, capricious, or corrupt. The directors are not bound to give reasons, but the court must be satisfied that they have considered the transfer and have refused to register it under powers given to them. If, however, they give reasons for refusal the court will consider whether they are legitimate. (*In re Bell Bros.*, 65 L.T. 245 ; *Sree Mahant Kishora Donjee v. Coimbatore Spng. & W. Co.*, (1902) 26 Mad. 79-83 ; *Muir Mills v. T. H. Condon*, (1900) 22 All. 410.)

A forged transfer is no transfer and does not, therefore, give the transferee any title to the shares. If, however, the company acting on the forged transfer issues a certificate to an innocent transferee it would be liable to make good to the transferee whatever loss he may have suffered while acting on the certificate issued by the company

by relying on it and paying the value thereof. [*Bahia and San Francisco Railway Co.*, (1868) L.R. 3 Q.B. 584.]

### Forfeiture of Shares

The company by its Articles may reserve the right of forfeiting the shares of any member for any reason which may be stated in the prospectus. The forfeiture is provided for in cases of non-payment or for some similar reason, but this power must not be too oppressive or illegal. In the case of voluntary liquidation this provision may be given effect to by the liquidator by calling upon the directors to exercise their powers. The forfeiture, in its regular course, would release the member from his past liability on the shares and therefore, it is general and usual to provide in the Articles that in case of forfeiture the members shall still be liable to pay the past calls, i.e. those made before forfeiture. Of course, with regard to forfeited shares there cannot be any future liability.

### Transfer to a Firm

The transfer may be to a firm in its firm name and, if accepted, the partners become individually liable for calls. The usual and proper course is to get the names of members entered in the register as joint holders.

### Transfer after Liquidation

With regard to the transfer of shares after the company is once in liquidation, it is laid down that in the case of voluntary winding up the transfer of shares can only be made with the request or assent of the liquidator and that any other transfer or alteration in the status of a member after the commencement of the winding up shall be void; whereas in the case of winding up by or under the supervision of the court any transfer of shares or alteration in the status of its members can only be made with the sanction of the court, otherwise it would be void (Sec. 227).

Frequently directors appoint one of their number as a managing director, to look after the management of the company in detail. Here two offices, namely that of the manager and the director, are merged into one person.

Here it will be interesting to note that our Indian Companies (Amendment) Act of 1936 now specifically defines a manager as distinguished from managing agent, which definition must be usefully considered in connection with the discussion of the position of the managing director because as we have already seen a managing director is a director who is also a manager. The definition of a manager according to Sec. 2(1)(9) is as follows:—

**Manager** means a person who, subject to the control and direction of the directors, has the management of the whole affairs of the company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not.

In order to appoint such a managing director and to delegate to him such powers of the board as may be deemed necessary, power must be given to the company by special Articles as is generally the case. (*Nelson v. James Nelson & Sons*, (1914) 2 K.B. 770.) The company in general meeting may also empower the directors to appoint a managing director. (*Hoschoek Proprietary Co. v. Fuke*, (1906) 1 Ch. 148.) Once the directors are given the power to appoint managing directors, the company cannot interfere with the discretion of the directors in the exercise of these powers. (*Logan Ltd. v. Davis*, (1911) 104 L.T. 914.)

### MANAGING AGENTS

The managing agent is now defined, in Section 2(4A), by our Indian Companies Act of 1913 as under :—

**Managing Agent** means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement, and includes any person, firm or company occupying such position by whatever name called.

**Explanation.**—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.

It is now laid down that managing agents shall not be appointed after the commencement of the Indian Companies Amendment Act to hold office for a term of more than 20 years at a time. With regard, however, to those who are appointed prior to the commencement of the Act it is now laid down that notwithstanding anything to the contrary contained in the Articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies Amendment Act of 1936 shall not continue to hold office after the expiry of 20 years from the commencement of the Act unless he is re-appointed to the office or unless he has been re-appointed thereto before the expiry of the said 20 years. Thus the rights of the old managing agents appointed prior to the coming in force of the Amendment Act of 1936 have been preserved for a further period of 20 years after the commencement of the Act in case their agreements are lengthy enough to exceed this period. If a managing agent becomes insolvent his office is vacated and transfer of office of a managing agent is void, unless it is approved by the company in a general meeting. If a charge is given by a managing agent in connection with his

own debts on his own income or remuneration or if he were to assign some or any part of it, the same shall be void as against the company. Where the managing agent is removed either through the company being wound up or for any other reason, he shall not be entitled to any compensation even though provided in the agreement, in case the court finds that the winding up was due to the negligence or default of the managing agent himself. All alterations and variations in managing agency contracts or agreements must be made with the approval of the company after the commencement of the Amending Act of 1936.

With reference to their remuneration also it is now laid down that it shall be based on a fixed percentage of net annual profits of the company with a provision for minimum payment in case of absence of or inadequacy of profits together with office allowance to be defined in the agreement of management. Any additional stipulation in the agreement other than these as to remuneration will not be binding on the company unless sanctioned by the company by a special resolution. Even the net profits on which the remuneration is to be calculated on the percentage basis are now defined and it is laid down that they shall be calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from Government or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account of any sum which may be set aside in each year out of the profits for reserve or any other special fund. This rule as to remuneration does not apply to a private limited company except a private company which is a subsidiary company of a public company or to any company whose principal business is insurance. Loans to managing agents are also now prohibited from being given by the company from its own moneys though the managing agents can hold credit in a current account maintained subject to the limits previously approved by the board of directors of a company to the managing agents for the purposes of the company's business. If this rule is violated, every director of the company who is responsible for the violation or the giving of the loan is liable to a fine and if the loan is not repaid, the director shall be liable jointly and severally for the amount unpaid. The managing agents also cannot enter into contracts for the purchase and supply of goods to the company except with the consent of three-fourths of the directors present and entitled to vote on the resolution.

It is now also prohibited after the commencement of the Act for one company under the management of the same managing agent to

make any loan to another company nor is one company permitted to guarantee a debt or loan of the other. Thus, inter-company loans under the same managing agency are now prohibited. The managing agent cannot now issue any debentures except with the authority of directors and within limits fixed by them. Even a company cannot delegate this power to the managing agents. A managing agent is also prohibited from engaging in any business on his own account which is of the same nature and directly competes with the business carried on by the company under his management or by a subsidiary company of such company.

## DIVIDENDS

The division of profits among shareholders or members of a company is made in dividends. The dividends cannot be paid out of the capital of a company, but they are only to be paid out of the profits made and accrued. If the directors willfully pay dividends out of capital, they would have to make good the amount personally. (*Oxford Benefit Building Society*, (1887) 53 Ch.D. 502.) So are the auditors of the company who are parties to the payment of dividends out of capital. (*Municipal Freehold Land Co., Ltd. v. Pollington*, (1890) 63 L.T. 238.) In such cases, however, the share holders who receive the dividend with the knowledge that it was paid out of capital are bound to indemnify the directors against their liability on such a payment. (*Murham v. Grant*, (1900) 1 Q.B. 88 C.A.) The Act, however, provides that where shares are issued by a company for the purpose of raising money to defray expenses for the construction of any work or buildings, or for the provision of any plant which cannot be made profitable for any lengthened period, the company may pay interest for so much of the share capital as is for the time being paid up for the period. This can only be done if authorized by the Articles, or by a special resolution, and that too, after having obtained the previous sanction of the Local Government. The Local Government may appoint a person to enquire and report as to the circumstances of the case before sanctioning a dividend and may also require the company to give security for the payment of the cost of such an enquiry (Sec. 107). It is also provided by the same section that the rate of interest shall not exceed 4 per cent per annum or any lower sum as may be prescribed, and that such a payment should be shown clearly in the accounts of the company. The payment of such an interest will not operate as a reduction of the amount paid up on the shares. This section will not apply to the Indian Railway Companies Act or the Indian Tramways Act. The power as to the payment of dividends is generally vested in the directors by the Articles or the power may have been given in general meeting. The payment of dividend for any particular year is entirely at the discretion of the directors and they cannot be compelled to declare one.

The directors have also the power to cancel the declaration of a dividend which they declared as an *interim* dividend if they find later on that it would have to be paid out of capital. The dividends are to be paid in cash unless the Articles permit them to be paid in shares.

With regard to the payment of dividends out of profits, considerable difficulty has arisen through conflicting decisions on the question as to what are divisible profits. As a general rule the balance of the earnings of a company after deducting from them the expenses for bringing about these earnings is a measure of such profits. (Of course, before arriving at the amount of profits, allowance for the proper depreciation of wasting assets should be made. According to Jessel, M. R., "the profits of the year, of course, mean the surplus in receipts after paying expenses and restoring the capital to the place it was on 1st January in that year." (*Dent v. London Tramway Co.*, (1880) 16 Ch.D., p. 354.) The last point, that is restoration of lost capital, has been a point on which conflicting decisions have been given. Formerly the Appeal courts seem to have favoured the proposition that it was not absolutely necessary to make good lost capital during the subsequent years before paying a dividend, out of the excess of the current receipts over the current expenditure. Immediately after, this decision was doubted by the House of Lords, but no decisive final pronouncement was made on the point. (*Dovey v. Cory*, (1901) App. Cas. 477.) In *Lee v. Newchapel Asphalt Co.*, (1899) 41 Ch. C. I. P., it was decided that a dividend may be declared out of the profits without deducting losses of fixed capital but the loss on floating capital must be deducted out of the profits before arriving at the balance of divisible profits. This would, of course, mean that the depreciation on wasting capital assets as well as others may not be charged to profits before arriving at the figure of profits out of which dividends are to be paid as per the Articles. Profits, of course, mean trading profits, but under certain circumstances dividends may also be paid out of capital profits. (*Lubbock v. British Bank of S. America*, (1892) 2 Ch. 198); e.g. where there was a sale of some capital assets which resulted in a surplus in total assets in excess of the paid-up capital and the company's liabilities to outside creditors, the company was allowed to treat the excess as profits and distribute it as dividend. With regard to the necessity of charging proper depreciation on all assets of a wasting nature before arriving at the correct figure of profits, the following remarks of Swinfen Eady, J., in *re Crabtree*, (1912) 106 L.T. 49, may well be quoted here: "In the ordinary course of ascertaining the profits of a business where there is power machinery and trade machinery which is necessary in order to perform the work of the business, it is, in my opinion, essential that, in addition to all sums actually expended in repairing the machinery, or in renewing parts, there should be also written off

a proper sum for depreciation, and that sum, varying with the class of machinery, with the nature of the business, and with the life of the machinery, has been written off for depreciation."

The profits may be what are known as **capital profits**, i.e. the increase which the capital itself has brought about; e.g. the rise in the value of fixed assets. For the payment of dividend out of such profits it is necessary to remember that the capital as meant by law, in case of joint stock companies, is the actual amount subscribed pursuant to the Memorandum of Association and that which is represented by such subscription. If, therefore, there has been any accretion to that capital according to Lindley, J., in *Verner v. General Commercial Investment Trust*, (1894) 2 Ch. 264, such an accretion may be realised and distributed among the shareholders by way of dividend. It is, however, necessary, in order to arrive at such an accretion, to get all the assets and the liabilities revalued and after deducting the figure of subscribed capital the balance of divisible profits may be arrived at.

The power to declare dividends may be vested either in the directors or in the general meeting as may be provided for in the Articles of Association. Generally speaking, the Articles empower the directors to declare *interim* dividends whereas the power to declare a final dividend is left to the company in general meeting. Where the directors have the power to declare *interim* dividends they cannot be compelled to do so. Again, the Articles usually provide that the directors shall have the power to decide what sum out of profits should be set aside for a reserve fund and in such cases their discretion cannot be questioned on the ground that such a course reduces the amount available for dividends. (*Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 775, C.A.) If no such power is given to the directors, the company, in its general meeting, can decide what amount, if any, should be set aside for the reserve fund. Of course, profits forming the reserve fund, remain profits and are capable of future division as such. (*Lever v. Lands Securities Co.*, (1891) 8 T.L.R. 94.)

### Limitation applying to Dividends

It has been decided in a Madras Full Bench case, *A. Venkata Gurunatha R. Sheshayya v. Sri Tripurasundari Cotton Press*, 49 Mad. 468, that a suit for dividend declared is a suit for debts, and thus limitation here in India applies to it after the expiry of six years from the date the right to sue accrues. In England the period is twenty years from the date of declaration. (*Artisans Land & Mortgage Corporation*, (1904) 1 Ch.D. 796.)

The directors when empowered to declare the amounts available for dividend are entitled to lay aside whatever sum they think necessary for the reserve fund before arriving at this balance.



## MEETINGS

The meetings that may be held in connection with joint stock companies are the—

- (1) Annual general meeting,
- (2) Statutory meeting, and
- (3) Extraordinary general meetings.

It may be added that though the usual conduct of the business of a company is vested in duly appointed officers, the ultimate and final control is reserved to the company in its general meeting. These meetings are in the usual course summoned by the secretary at the usual notice of seven clear days. In the case of an **extraordinary meeting**, the purpose for which such a meeting is summoned is stated in the notice. The chairman of the meeting assumes control as to the conduct of the meeting and usually places the business before the meeting as per the agenda, and the debate on any particular matter may be put an end to by the chairman with the concurrence of the majority. [*Wull v. London and Northern Assets Corporation No. 1*, (1898) 2 Ch. 469.] At these meetings members alone can be present. The proxies should almost in every case, as per the provisions of the Articles, have to be themselves members and no member can insist on his solicitor accompanying him to the meeting. At these meetings shareholders can speak on any proposition that may be before it but no shareholder is entitled to speak as much as he pleases but has a right to be heard in reasonable terms for a reasonable time. (*Parashram Dattatraya Shamdasani v. The Tutu Bank*, 47 Bom. 915.) Again, if a notice as to a meeting is duly given such a meeting cannot be cancelled by a subsequent notice but the meeting must be held and adjourned. [*Smith v. Paranga Mines, Ltd.*, (1906) 2 Ch. 193.] It has also been held that a company is not "corporately assembled" unless the meeting has been summoned after due notice as per its Articles is given and thus every member is given an opportunity to be present. (*Smyth v. Darby*, (1849) 2 H.L.C. 789.) Of course, at every meeting the required quorum must be present as per the Articles of Association.

## (1) ANNUAL GENERAL MEETING

A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting. The failure to hold these meetings, as provided, would make every officer of the company knowingly a party thereto, liable to be fined to the extent of five hundred rupees, and in case of such default the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company (Sec. 76). At this general

meeting the report on the company's affairs and the final accounts and balance sheet duly certified is generally to be laid before the meeting. The chairman of the company, or the person elected chairman, usually introduces the report with an opening speech in which he generally reviews the work of the company during the period under consideration. He then moves the adoption of the report and is seconded by one of the directors present. The report is then open to the meeting for discussion and every member present has a right to offer his remarks and criticism on it. The members may also call for any information they may desire but the directors are bound to give only such information as they think best in the interests of the company. If the members are dissatisfied with the report they can oppose the adoption of it; if they succeed, that would amount to a vote of censure on the directors. If the report be carried, the resolution for dividend (if any) to be paid, would be moved by one of the directors. The meeting would then terminate with the election or re-election of directors and auditors and the usual vote of thanks to the chair. The chairman of a company can, unless otherwise provided for by the Articles, adjourn the meeting for a good cause by leaving the chair. If, however, the Articles require the adjournment to be decided upon by a majority, the chairman must consult the meeting on the question of the adjournment, failing which the meeting can elect its own chairman and proceed with the business.

### Voting at Meetings

The power of voting at meetings of shareholders is usually specifically provided for by the Articles of Association. It is usually on the footing of one vote for every share, but it may be restricted and certain classes of shareholders may not have voting power at all or one vote may be provided for a certain number of shares. Absent shareholders may vote by proxies if the Articles so provide. It has been recently held that a shareholder who has given a proxy is free to attend and vote and when he does so vote the proxy is rejected. [*Cousins v. International Brick Co.*, (1931) 2 Ch. 90]

### (2) STATUTORY MEETING

Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting. At the statutory meeting the statutory report, which has to be sent to every member ten days before the meeting and which has to be certified by at least two directors, is to be considered. The

statutory report is to contain information about the total number of shares allotted distinguishing those allotted as fully or partly paid otherwise than in cash, the total amount of cash received in respect of all the shares allotted, also an abstract of the receipts of the company whether from its share capital or from debentures and of the payments made thereout upto a date within seven days of the date of the report. The receipts and expenditure are to be shown under distinctive headings. The receipts of the company from shares and debentures and other sources, the payments made thereout and particulars concerning the balance remaining in hand and an account or estimate of the preliminary expenses of the company ought to be clearly shown. The report has also to show the names, addresses and description of the directors, auditors (if any), manager (if any) and secretary of the company. If any contract is to be submitted or the modification of which is to be put to the meeting for approval, particulars with regard to that contract have also to be stated together with particulars of the modification (if any) of such contract. A copy of the report has also to be filed with the registrar. At this meeting any of the members present shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not ; but no resolution, of which notice has not been given in accordance with the Articles, may be passed (Sec. 77).

### (3) EXTRAORDINARY MEETING

The directors may call an extraordinary general meeting, whenever they consider it desirable. Further, the directors of the company, which has a share capital, shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company, on which all calls or other sums due have been paid, forthwith proceed to call an extraordinary general meeting of the company. The requisition must state the objects of the meeting and must be signed by the requisitionists. If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists or a majority of them in value may themselves call a meeting within three months of the date of the deposit of the requisition. If at this meeting any resolution is passed which requires confirmation at another meeting, the directors shall forthwith call a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution, and if they fail to do so within seven days from the date of the passing of the first resolution, the requisitionists may themselves call the meeting (Sec. 78).

It may be further added that the voting at the meeting shall depend upon the provisions of the Articles but in the absence of these.

Every member shall have one vote and any person elected by the members present at a meeting may be a chairman thereof, in case a chairman is not appointed by the regulations of the company or the one appointed is not present (Sec. 79).

### Resolutions

The resolutions passed at a meeting may be (1) ordinary, (2) extraordinary, or (3) special.

An *ordinary resolution* is a resolution passed by the majority of such members as are entitled to vote who are present in person or by proxy.

An *extraordinary resolution* is a resolution which has been passed by a majority of not less than three-fourths of such members entitled to vote, as are present in person or by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given (Sec. 81).

A *special resolution* is a resolution passed in the manner required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given: provided that if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given (Sec. 81).

At any of these meetings where any of these resolutions is proposed to be passed a poll may be demanded by three persons for the time being entitled to vote according to the Articles unless the Articles require a larger number, but such number must not exceed five in any case. The chairman, upon a poll being demanded, shall direct the voting to be computed in accordance with the regulations and the Articles, i.e. according to the number of votes to which each member is entitled as per the provisions in the Articles. The chairman may, however, direct the voting to be taken at the same meeting or in any other manner (Sec. 81).

It may be added that a copy of each special and extraordinary resolution shall, within fifteen days from the confirmation of the special resolution, or from the passing of the extraordinary resolution, be filed with the registrar (Sec. 82). It is further provided that the proceedings of the general meeting and of the meetings of directors must be entered in books kept for that purpose in the form of minutes and that these minutes should be signed by the chairman of the meeting at which the proceedings were held or by the chairman of the next succeeding meeting and that such signed minutes shall be evidence of the proceedings.

### Special Resolutions when necessary

The special resolutions are necessary when

- (1) the articles of the company are to be altered ; or where
- (2) the memorandum has to be altered (of course after the leave of the court as may be necessary under law) ; or
- (3) to alter the name of the company with the consent of the local Government ; or
- (4) for effecting the reduction in the capital of the company ; or
- (5) for sub-division of same.

### LOANS, MORTGAGES AND DEBENTURES

How far a company can borrow depends on its constitution and the nature of its business. Thus the power to borrow, whether on mortgage or otherwise, may be either express or implied from the nature of the business ; e.g. a trading company is held to have an implied power to borrow. When, however, the company has the power to borrow it can do so by various means such as, by a legal or equitable mortgage, by debenture bonds, bills of exchange, promissory notes, bank loans, overdrafts, etc. If, however, the company has no power to borrow, the loan and all securities for it are entirely void ; whereas, if the loan is within its power, but the directors had no power to close such a loan, the company may ratify such a loan at its discretion. With regard to a charge or mortgage, a company with borrowing powers can not only charge the present but also the future property such as book debts, uncalled capital exclusive of 'reserve capital', etc. If a company borrows on deposits the depositor gets no security or charge on the company's property.

The most usual form in which a company borrows is by the issue of debentures. These debentures may constitute so many bonds for a simple loan, viz. *naked* debentures, or they may be secured by a debenture-holders on one side and the company on the other. The charge may be either *floating* or *fixed*. When the charge is *floating* the company is free to deal with the property forming the subject-matter of the charge until the said charge gets 'fixed' by an event such as the winding up of the company. Until such event occurs the company is, as we have seen, free to deal with its property and therefore it can even mortgage such property in priority to the floating charge. When such a floating charge is created the usual practice is to draw out a *trust-deed* as between the trustees on behalf of the debenture-holders on one side and the company on the other. The trustees come in as soon as the charge becomes fixed. In the case of a fixed charge a particular property, or a set of properties, are specifically mortgaged with the debenture-holders. It may be further added that, in accordance with Section 109—

(1) Every mortgage or charge created after the commencement of this Act by a company and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or
- (d) a mortgage or charge on any book debts of the company; or
- (e) a mortgage or charge, not being a pledge on any movable property of the company except stock in trade; or
- (f) a floating charge on the undertaking or property of the company;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in the manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.

Provided that—

(i) in case of a mortgage or charge created out of British India comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy, could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of creation of mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the Registrar; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

### Registration of charges on properties acquired subject to charge

(1) Where after the commencement of the Indian Companies (Amendment) Act, 1938, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees. (Sec. 109A).

In case, however, where a series of debentures containing any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created, it shall be sufficient if these are filed with the registrar within twenty-one days after the execution of the deed or, if there is no deed, after the execution of any debentures of the series, the following particulars:—

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolution authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees (if any) for the debenture-holders (Sec. 110).

Again, if a commission, discount, or allowance had to be paid directly or indirectly on the issue of such debentures, the particulars of such commission, discount or allowance as the amount or percentage, should also be filed.

The debentures may be redeemable at the expiry of a fixed period, at notice, or irredeemable. The last named debentures give a sort of perpetual annuity to the holder and fall due on the winding up, unless the words irredeemable were used, as may appear from the context, to mean that the holder cannot demand payment at his option. The holder can also enforce his security if the company parts with the whole, or substantially the whole of its undertaking. The interest payable on debentures must be clearly stated in them and though it may be expressed to be payable at fixed intervals it falls due *de die in diem*. As debenture-holders, unlike shareholders, are creditors of the

company, the interest has to be paid as agreed irrespective of profits or losses made by the company. The non-payment of interest, usually as per stipulations inserted, makes the capital payable immediately.

Debentures are usually made transferable in the same manner as shares. The debentures may be made to bearer with a view to make them assume as far as possible the character of negotiable instruments. In these cases arrangement is made for the payment of interest by the issue of coupons which are annexed to the certificates which are to be cashed by the holder as each falls due. The last of the coupons, usually known as the "talon", entitles the holder to the issue of a fresh series of coupons for future years.

### Debenture Trust-Deed

Where a large loan is raised by the issue of debentures, the holders of debentures are also given a fixed charge on some specific property of the company. For this purpose it is usual to have a trust-deed prepared, under which the free-hold or lease-hold property is specifically mortgaged and specially conveyed to trustees on behalf of the debenture-holders. The mortgage deed gives powers to the persons named therein as trustees, powers of acting on behalf of the debenture-holders upon emergencies. The deed generally contains detailed conditions and stipulations safeguarding the interest of the debenture-holders which cannot be done in the case of debentures without a special trust-deed because in the latter case these conditions and stipulations would have to be endorsed or printed on the back of the debentures, which method hardly provides the requisite scope for inserting details. It must be further noted that when debentures are issued creating a charge it should be clearly declared that each debenture of the series issued is to rank equally with the others of that series, otherwise the legal position will be that each of the series issued will have priority over those issued later. [*Gartside v. Silkstone and N. Coal and I. Co.*, (1882) 21 Ch.D. 762.]

When a trust-deed is prepared, that generally gives power to the trustees to appoint receivers on the happening of contingencies specifically provided for in the deed. In the absence of such specific power, application has to be made to the court for the appointment of a receiver. This debenture trust-deed creating the mortgage or charge has of course to be registered (Sec. 109).

### STATUTORY BOOKS

Every company is bound to keep the following books under the Companies Act:—

(1) *A Register of Members* showing the names, addresses and occupations, if any, of the members and in case of a company having a share capital, the statement of the shares held by each member, distinguishing each share by its number, together with the amount



paid, or agreed to be paid, or considered as paid on these shares. Also the date on which each person was entered as a member and the date on which each person ceased to be a member, has to be stated in the register (Sec. 31).

(2) *A Register of Directors and Managers* stating the names, addresses and occupations of the directors and managers (Sec. 87).

(3) *A Register of Mortgages and Charges*.—A limited company must keep a register of mortgages and enter therein all mortgages and charges specifically affecting the property of the company, giving in each case, a short description of the property mortgaged or charged, the amount of the mortgage or charge, and the names of the mortgagees or persons entitled thereto (Sec. 123).

(4) *An Annual List* must be made out showing the names of persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all the persons who have ceased to be members since the date of the last return, or (in case of the first return) of the incorporation of the company. The annual summary shall state the names, addresses and occupations of all the past and present members mentioned therein, together with particulars of the number of shares held by each of the existing members at the date of the summary, specifying shares transferred since the date of the last return or since the date of incorporation as the case may be [Sec 32 (2)].

(5) *The Minute Book*.—The Indian Companies Act, Section 83, lays down that every company shall cause minutes of all proceedings of general meetings and of directors to be entered in the books kept for that purpose, and that such minutes ought to be signed by the chairman of the meeting at which the proceedings were held or by the chairman of the next succeeding meeting and that they shall be evidence of the proceedings. These minutes should not be altered subsequently by additions or subtractions because such alterations are held as irregular.

## ACCOUNTS OF JOINT STOCK COMPANIES

### Books to be kept by company and penalty for not keeping proper books

Section 130 of the Indian Companies Act of 1913 as amended by the Amending Act of 1936 lays down that :—

(1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;

(b) all sales and purchases of goods by the company ;

(c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up-to-dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2).

(4) In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company, and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.

### **Annual Balance Sheet**

(1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made upto a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months:

Provided that the registrar may for any special reason extend the period by a period not exceeding three months

(2) The balance sheet (and the profit and loss account or income and expenditure account) shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before that meeting. (Sec. 131).

### **Directors' Report**

(1) The directors shall make out and attach to every balance sheet a report with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance sheet

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorized in that behalf by the directors.

(3) The provisions of sub-section (3) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section. (Sec. 131A.)

### **Contents of Balance Sheet**

(1) The balance sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving such

particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

(2) The balance sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is, by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto. (Sec. 132.)

### **Balance Sheet to include Particulars as to Subsidiary Companies**

(1) Where a company, in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies, there shall be annexed to the balance sheet of the holding company the last audited balance sheet, profit and loss account and auditor's report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent.

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts.

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner.

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditor's report on the balance sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement which is to be annexed as aforesaid to the balance sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid the directors who sign the balance sheet shall so report in writing and their report shall be annexed to the balance sheet in lieu of the statement.

(5) The holding company may by a resolution authorize representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

The form of the balance sheet is also given in the Third Schedule of the Act marked I. The balance sheet has also to be signed by at least two directors and the manager in the case of ordinary companies, and by at least three directors and the manager in the case of banking companies. Where the number of directors, in the case of banking companies, is less than three, and in the case of trading companies less than two, all of them must sign. The balance sheet has to be passed at the general meeting of the company and in case the general meeting does not adopt the balance sheet that fact and the reason for its non-adoption are to be attached to the balance sheet, a copy of which is to be filed with the registrar. These rules as to balance sheet do not apply to private companies (Sec 134).

The Local Government may appoint one or more competent inspectors to investigate the affairs of any company with a view to report thereon in such manner as the Local Government may direct under any of the following circumstances:

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued,

(ii) in case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued.

(iii) in the case of a company not having a share capital on the application of not less than one-fifth in number of the persons in the company's register of members,

(iv) in the case of any company, on a report by the Registrar under Section 137 sub-section 5 (Sec 138).

The inspectors are given full powers to inspect all the books and documents which the officers of the company are bound to produce for their inspection and they can also examine on oath any such person or officer in relation to the business of the company. Any person who is an officer of the company, or has been an officer of the company, refuses to produce any of these books or documents, or to answer any questions relating to the affairs of the company, is liable to a fine for each of such offences. All the expenses of, and incidental to, the investigation and report shall be defrayed by the applicant unless the Government directs the same to be paid by the company (Secs. 140 & 141).

Besides this the company itself may, by a special resolution, appoint inspectors to inspect its affairs and such inspectors shall have the same powers and duties as the inspectors appointed by the Local Government, the only difference being that instead of reporting to the Local Government they shall report to such person and in such a manner as the company in general meeting may direct (Sec. 142).

With regard to the balance sheet, of course, the assets shown cannot by the very nature of things be expected to be shown at the exact valuation. As close a valuation as possible should, of course, be the aim in view. It frequently happens that the directors have over-depreciated the assets year by year so much so that by the end of the term of a certain number of years the whole of the assets of a particular class is virtually wiped off and disappears automatically from the balance sheet. The question naturally arises whether such a course, which is known among accountants and businessmen as the creation of a *secret reserve*, is legitimate and proper. In *Newton v. Birmingham Small Arms Co.*, (1906) 2 Ch., p. 387, Buckley, J., said with regard to the omission of the over-depreciated assets under the above circumstances, that "The result will be to show the financial position of the company to be not so good as in fact it is. If the balance sheet is so worded as to show that there is an undisclosed asset whose existence makes the financial position better than that shown, such a balance sheet will not, in my judgment, be necessarily inconsistent with the Act. Assets are often, by reason of prudence, estimated, and stated to be estimated at less than their probable real value. The purpose of the balance sheet is primarily to show that the financial position of the company is at least as good as there stated and not to show that it is not and may not be better."

With regard to the falsification of accounts, Section 236 lays down that "If any director, manager, officer or contributory of any company, being wound up, destroys, mutilates, alters or falsifies or fraudulently secretes any book, papers or securities, or makes or is privy to the making of, any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud

or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine."

## AUDITORS

### Appointment and Powers of Auditors

With regard to the professional audit, the shareholders have to appoint an auditor or auditors at their annual general meeting to audit the accounts for the next year and certify them and the law lays down that no person who is a director, officer or their partner or in the employ of the company, may be appointed to such place. If the shareholders fail to appoint an auditor at their annual meeting, the Local Government has the power to appoint one on the application of any member of the company (Sec. 144). Of course, the first auditors are generally appointed by the directors but they have to be re-appointed at the first annual general meeting. Now, with regard to this appointment, the shareholders and the investing public in India hardly seem to realize the fact that the auditors are their agents and are inspecting the accounts on behalf of the shareholders. By expressly laying down that no one in the service of the company as a servant, or acting in any way with the director or officer of the company as a servant, can be appointed, our present Act has rendered a great service. There have been cases in the past where the directors have been invariably putting up their nominees as their auditors, and in many cases they have secured the appointment of men that could hardly be expected to have any knowledge of company accounts. Our Act now lays down that auditors of companies ought to be appointed only from persons who have been authorized by the Governor General in Council to act as auditors. This provision not only ensures that men of certain experience and education in accounts would be appointed, but it is also gratifying to notice that we are in this regard a step in advance of the English Companies Act, 1929. It is hoped that these and various other responsibilities thrown by our Company Law on auditors will ensure the proper inspection of accounts, though, of course, much depends on the investing public, because unless the shareholders take an active interest at the annual meetings in the appointment of auditors, the best advantage of Section 144 of our Act cannot be enjoyed by our companies.

By our Act the auditors are given complete powers to call for and inspect all the books, accounts and vouchers and to have access to them at all times, and they are also entitled to ask for all information and explanations necessary. This power entitles them to call for even the minute books which were sometimes refused to them in the past. The Law requires the auditors to make a report, which is to be addressed to the shareholders for whom they act, and in the report they are to state clearly whether in their opinion, after examining the

accounts of the company, the balance sheet, as prepared by the directors, is correct. They have also to state whether they have obtained all the explanations and information they asked for from the directors and officers of the company, and whether these explanations were satisfactory.

Another departure with respect to auditors is the requirement by our present Act, that if any one wishes to nominate some other person in place of the present auditor, he should give at least fourteen days' notice to the company of his intention; the company officers are required to furnish copies of this notice to the shareholders and to the retiring auditor (Sec. 144, sub-sec. 6). Formerly in the absence of such a provision, an inconvenient auditor was quietly got rid of by the directors and promoters through a sudden nomination of a new man in his place at the general meeting. Now, as the auditors have to be notified they would naturally get time to place before the shareholders the true facts as to why a particular person wishes to substitute others in their place.

The exact language of Section 145, as to the powers of the auditors, is as follows: -

(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanations as may be necessary for the performance of the duties of the auditors

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance sheet and profit and loss account laid before the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether or not in their opinion the balance sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and

(c) whether (or not) such balance sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company; and

(d) whether in their opinion books of account have been kept by the company as required by Section 130.

(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees

### Duties and Liabilities of Auditors

The following passage with regard to the duties of auditors from the judgment of Lord Justice Lopes in *Kingston Cotton Mill Co. No. 2*, (1896) Ch.D. 228 29, may well be quoted here :-

"It is the duty of an auditor to bring to bear on the work he has to perform such skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution might depend on the particular circumstances of each case. An auditor is not bound to be a detective, or as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom, but in the absence of anything of that kind, he is only bound to be reasonable, cautious, and careful."

There is another equally interesting decision of Lord Justice Lindley in *London and General Bank*, (1895) 2 Ch. 673, where his Lordship has dealt with the duties of an auditor fully and clearly which may also be quoted here with advantage :-

"It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the dividends are properly or improperly declared provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that, but then comes the question—How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit will be worse than an idle farce. Assuming the books to be so kept as to show the true position of the company, the auditor has to frame a balance sheet showing that position according to the books, and to certify that the balance sheet presented is correct in that sense. An auditor, however, is not bound to do more than exercise reasonable care and skill in making enquiries and investigations. He is not an insurer. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little enquiry will be reasonably sufficient, and in practice, I believe, businessmen elect a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary."

In the case of *London Oil Storage Co. v. Seer, Hasluck & Co.*, King's Bench Division, 1st June 1904, Lord Chief Justice Alverston,



in the course of his summing up, laid down certain very important dicta on points which are of great value to the professional auditor.

The first rule he laid down was on the question whether inadequate remuneration of an auditor should ever be allowed as an excuse for failure of duty:—

"You have not to consider for a moment whether the auditor was sufficiently remunerated or not. He has accepted the position and duties of an auditor and you have not to consider aye or no, if he had a sufficient amount."

The next point brought out in this case was that the auditor cannot even bring the neglect of directors as his excuse for failure of duty. His Lordship said:—

"The auditor cannot shelter himself for any breach of duty under the neglect of the directors; he is there to do his duty to the company. The auditor most undoubtedly does undertake very considerable responsibilities, and is liable for proper discharge of his duties; if by want of reasonable care, he neglects his duty, and damage is caused to the company as such, he is responsible for that damage."

With regard to the auditor's duty to acquaint himself with the contents of the Articles of Association the case in point is *In re Republic of Bolivia Exploration Syndicate, Ltd.*, (1914) 1 Ch., p. 139. Here the dictum was laid down as per the headnote that "Company auditors are bound to know or make themselves acquainted with their duties under the company's Articles and under the Companies Acts for the time being in force, and if the audited balance sheets do not shew the true financial condition of the company, and damage is thereby occasioned, the onus is on the auditors to show that this damage is not the result of any breach of duty on their part."

"Auditors are *prima facie* responsible for *ultra vires* payments made on the face of their balance sheets, but whether and to what extent they are responsible for not discovering and calling attention to the illegality of payments made prior to the audit must depend on the special circumstances of each case."

In one case Lord Alverston, C. J., said to the effect that where the auditor employed his clerk to do some part of the work for him the same standard of care and skill were expected from the clerk as from the auditor.

In a recent case [*In re City Equitable Fire Insurance Co.*, (1925) 1 Ch.D. 407], it was laid down that "the measure of the auditor's responsibility depends upon the terms of his engagement. There may be a special contract defining the duties and liabilities of the auditors. If there is, then that contract governs the question." In the same case, with regard to the duties of an auditor as to checking the actual securities in which the company has invested its reserve, it was laid down that (1) the auditor must actually verify whether the securities exist; (2) if they happen to be in the custody of a particular company, firm, or person, the auditor should satisfy himself that they are in

existence; (3) if not satisfied, he should report the fact to the shareholders; (4) if the auditor discovers that the securities are not in proper custody he should set the matter right at once; (5) if in safe custody with someone the auditor should not be content with a mere certificate from them unless they are trustworthy parties who in ordinary course of business keep securities for their customers.

With regard to the auditor's report which the auditor has to submit, the following form was recommended to the Council of the Institute of Chartered Accountants in England and Wales by four eminent counsel whose combined opinion was requested by the Institute after the passing of the English Companies Act, 1907, which form may be followed with advantage by our auditors in India under the Indian Companies Act. The form is as follows:—

*Report of the Auditors to the Shareholders of.....Limited.*

"We have audited the balance sheet of the.....Limited, dated the.....day of.....and (here identify it "as above set forth" or "within contained", or a copy of which is annexed hereto and "initialled by us" or "a copy of which has been initialled by us.")

"We have obtained all the information and explanations we have required."

"In our opinion such balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given us, and as shown by the books of the company."

*Note.*—In the case of companies in India, it is necessary to add the following to the above certificate under the Indian Companies (Amendment) Act of 1936:—

"In our opinion books of account have been kept by the company as required by Sec. 130."

The council concerned recommended that the report should always be placed at the foot of the balance sheet, but if the report of the auditors cannot be placed at the foot of the balance sheet, it should be attached thereto.

It was the opinion of the Council that it was not the duty of the auditors to supply the shareholders with a copy of the balance sheet or that of the report, or to furnish individual shareholders with the same. Also, that it was not the duty of the auditors to see that the balance sheet was signed by the required number of directors.

Here it may be added that if the auditor has differed from the directors on any item of accounts and has asked the directors to verify it and if the directors have failed to do so, it is the duty of the auditor to state that fact in his report. In one case where the auditors so differing had asked the directors not to declare dividends, as in their opinion the profits were not sufficient, and afterwards allowed themselves to be influenced by the directors not to insert this fact in their report, the auditors were held to be jointly liable to make good to the company the money paid out as dividend on that occasion.

## CHAPTER XII

### LIQUIDATION OR WINDING UP OF JOINT STOCK COMPANIES

**LIQUIDATION** is defined as a legal process in respect of a joint stock company by which its affairs are wound up and its assets sold and converted into hard cash for being divided among the persons entitled thereto : i.e. first the creditors of the company, and next after the full settlement of the claims of this class, the shareholders. The shareholders of a joint stock company being proprietors, naturally stand in the relation of debtors to the creditors of the company, and, therefore, unless the creditors are fully paid, the shareholders do not expect any contribution. It may be further mentioned here that the shareholders, in case of liquidation, are known as contributories, by which name we shall call them in this chapter.

A company which is in liquidation is not necessarily in an insolvent condition. There have been cases where flourishing companies have been voluntarily wound up by the shareholders because they thought that was the best course to follow in the interests of the company specially where they were afraid that owing to the change in time and circumstances the business of the company was not likely to prove as successful in the future as it had been in the past. There are also cases where voluntary winding up is resorted to because of losses which threaten to wipe off the capital. There are others who resort to a winding up because of their hopeless state of insolvency.

The process of winding up may be (1) "voluntary", (2) "voluntary under supervision of the court", or (3) "compulsory by order of the court".

In the first case, viz. that of **voluntary liquidation**, the shareholders meet together in a meeting and resolve to wind up the company voluntarily. The resolution required for such a course may be either an "ordinary resolution", which is made up of a simple majority of those "present and voting personally or by proxy", or an "extraordinary resolution", which is made up of a three-quarters majority of the shareholders present and voting personally or by proxy, or a "special resolution", viz. "extraordinary" followed by "ordinary" passed at two separate meetings of shareholders, the second meeting being held not less than fourteen clear days after the first meeting and not more than a month.

An ordinary resolution is necessary to wind up a company if, as per provision in its Articles of Association, (1) the time for which the company was to continue business has expired, or (2) where the event

on the happening of which the company was to be wound up has happened. An extraordinary resolution is required to bring about a voluntary liquidation where the shareholders decide to wind up on account of the company being unable to meet its liabilities. A special resolution is required in all other cases which do not fall under the two headings above mentioned, viz. those falling under the "ordinary" and the "extraordinary" resolutions (Sec. 203). After a company is put into voluntary liquidation, it can carry on its business for the purposes of liquidation alone, and for that purpose its corporate powers continue. The liquidator, in the case of voluntary liquidation, is an officer generally appointed by the shareholders and acts as an agent of the shareholders. It, however, often happens that a compromise is arrived at with the creditors to hold their meeting and to nominate one of their own men to act as the liquidator of the company. The creditors have also the right to apply to the court, if they are not satisfied, requesting the court to nominate the liquidator, on their behalf, either to act jointly with the shareholders' nominee, or in his place. The court has the entire discretion to deal with the application, as to it seems just, after considering the circumstances of the case. The liquidator in a voluntary winding up exercises wide powers which he can wield without obtaining the sanction of the court.

### **VOLUNTARY WINDING UP**

It should be noted that in England under the new English Companies Act of 1929 voluntary winding up is now divided into two divisions, viz. (1) Members' voluntary winding up, and (2) Creditors' voluntary winding up. The same division is now adopted by us bodily in India under the Amendment Act of 1936.

#### **Members' Voluntary Winding up**

When it is proposed to wind up a company voluntarily, the directors of the company or in the case of a company having more than two directors, the majority of the directors may at a meeting of the directors held before the date on which the notice of the meeting at which the resolution for the winding up of a company is to be proposed is sent out, make a statutory declaration to the effect that they have made full enquiry into the affairs of the company and that having done so, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of the winding up. This declaration must be delivered to the registrar of companies for registration before it comes into force. In this case all the old powers of the liquidator in the voluntary winding up are maintained and the rights of creditors in a voluntary winding up as given in Section 188 of the old English Act and in Section 209 of the Indian Act are removed. This is because once the company is declared solvent the creditors' intervention is

considered unnecessary because the persons principally interested are the shareholders or contributories who would share in the surplus, if any, after the creditors are paid out. This section above referred to, as the student will remember, made it compulsory for the voluntary liquidator to call a meeting of the creditors, consult their wishes and give them an opportunity to decide whether they should apply to the court for the appointment as liquidator of any other person in place of or jointly with the liquidator appointed by the members. All this is omitted in the case of members' voluntary liquidation under the New Act.

### **Creditors' Voluntary Winding up**

Where the directors are not able to file the statutory declaration as described in the members' voluntary winding up, the proceeding will have to be conducted as the creditors' voluntary winding up. In this case the company shall cause a meeting of the creditors to be summoned on the day or the next day following the day on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed. Notices of this creditors' meeting must be sent to each and every creditor and should also be advertised once in the *Gazette* and once at least in two local newspapers in the district where the registered office or the principal place of business of the company is situate. At this meeting a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claim should be laid by the directors, and one of the directors should preside. If any default is made in this the directors and officers are liable to a penalty of a fine.

The creditors and the company may nominate a person to be the liquidator. Should the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator and if no person is nominated by the creditors the company's nominee shall be the liquidator. If the company is not satisfied with the creditors' nominee it may within seven days after the date on which the nomination was made by the creditors, apply to the court for an order, directing that the company's nominee shall be liquidator either alone or jointly with the creditors' nominee or that some other person be appointed liquidator.

The creditors may at their meeting also appoint a Committee of Inspection consisting of not more than five persons. The Committee of Inspection or failing that the creditors may fix the remuneration to be paid to liquidator or liquidators. In case of death or resignation of the liquidator the creditors may fill up the vacancy. Should the winding up continue for more than one year the liquidator shall summon a general meeting of creditors at the end of the first year from the commencement of the winding up. An account of his acts

and dealings and of the conduct of winding up during the preceding year has to be laid before this meeting. If the liquidation lasts for more than one year similar meetings have to be called at the end of each succeeding year and when the liquidation is completed, final meetings have to be called both of the company and the creditors and accounts laid before them. One week after the date of these meetings, or if the meetings are not held on the same date after the date of the later meeting, the liquidator shall send to the registrar of companies a copy of the account and a return of the holding of the meetings and of their dates. Three months after the registration of these returns the company shall be deemed to be dissolved.

### **Powers of the Liquidator**

The powers of a liquidator as per Section 179 of the Indian Companies Act are the following :—

- (a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;
- (b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;
- (c) to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;
- (d) to do all acts and to execute, in the name of and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal ;
- (e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent ; and rateably with the other separate creditors ;
- (f) to draw, accept, make and endorse any bill of exchange; *hundi* or promissory note in the name of and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, *hundi* or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business ;
- (g) to raise on the security of the assets of the company any money requisite ;
- (h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently

done in the name of the company ; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General ;

- (i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets,

With regard to the above, it may be added that in the case of compulsory liquidation the official liquidator has power to exercise the above-stated powers with the sanction of the court, but as per Section 180 of the same Act, the court may provide by an order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court. In the case of voluntary liquidation as per Section 207, sub-section 4, the voluntary liquidator may, without the sanction of the court, exercise all powers under the Indian Companies Act as above stated. In the case of ' supervision ' liquidation Section 224 (2) of the Indian Companies Act states that the supervision liquidator shall have the same power, and shall be subject to the same obligations, and in all respects stand in the same position, as if he had been appointed by the company, i.e. as in the case of voluntary liquidation.

The consequences which ensue on voluntary liquidation, as laid down by Section 207 of the Indian Companies Act, are the following :—

(1) the assets of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto, shall, unless the Articles otherwise provide, be distributed among the members according to their rights and interests in the company ;

(2) the company, in general meeting, shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them ;

(3) on the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions continuance thereof ;

(4) the liquidator may, without the sanction of the court, exercise all powers by this Act given to the Official Liquidator in a winding up by the court ;

(5) the liquidator may exercise the powers of the court under this Act of settling a list of contributories, and of making calls, and shall pay the debts of the company, and adjust the rights of the contributories among themselves ;

(6) the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories ;

(7) when several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined by the company at the time of their appointment, or in default of such determination by any number not less than two ;

(8) if from any cause whatever there is no liquidator acting, the court may, on the application of a contributory, appoint a liquidator ;

(9) the court may, on cause shown, remove a liquidator, and appoint another liquidator.

### **Appointment of Liquidators**

The liquidator in voluntary liquidation is appointed by the general meeting of shareholders and it is his duty to inform the registrar of joint stock companies within twenty-one days of his appointment in the prescribed form. He should also, within seven days of appointment, give notice through the post, to all persons who appear to him to be creditors of the company, informing them that a meeting of the creditors of the company would be held on a particular day, which the liquidator should himself fix within one month after his appointment; and not less than twenty-one days from it. At the meeting, the creditors should either accept the appointment of the same person as liquidator or suggest any other person in substitution of the one appointed, or to act jointly with him. The court, in every case, shall decide the question whether such an appointment is just and in the interests of the creditors. Any vacancy in the office of a liquidator caused through death, resignation, or otherwise, may be filled up by the meeting of contributories.

It very often happens that when a company has decided on voluntary winding up, the court may make an order that the voluntary winding up shall continue, but subject to such supervision of the court, and with such liberties for creditors, contributories, or others, to apply to the court and generally on such terms and conditions as to the court seems just. In making such an order the court will consider the wishes of the creditors and contributories. In case of "supervision", the liquidator is appointed by the court, and generally the liquidator in voluntary winding up is allowed to continue. The liquidator in "supervision" winding up, though appointed by the court, is subject to the same obligations, and in all respects stands in the same position as if he had been appointed by the company. His powers also remain the same as in case of voluntary winding up, except in so far as they are modified by special directions and orders given by the court.

### **Lists of Contributories**

Contributories are those shareholders in a limited company who have not yet paid the balance of call on their shares, and in case of unlimited companies, all persons appearing on the register as shareholders who have to pay or contribute until all the debts and liabilities of the company are fully settled. Further, the directors, whose liability as per the regulations of the company is unlimited, would also fall under this designation. Sec. 158 states that "the term 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound up," etc. It becomes, therefore, important for the liquidator to settle as to who are such contributories and for that purpose he prepares lists of such persons.



With regard to the list of contributories, the liquidator prepares two separate lists, viz. "A" list and "B" list. In the "A" list he inserts the names of those contributories who were shareholders as per the share register at the date of the liquidation of the company. On the "B" list he records the names of those shareholders who have transferred their shares within one year of the winding up of the company. He then tries to recover what he can from the shareholders or contributories, whose names stand on the "A" list. If, after recovering all these, there are still debts of the company unpaid, he picks out from the "B" list those shareholders who had transferred their shares to members of the "A" list within one year of liquidation and whose transferees had failed to pay up the calls made by the liquidators against those shares. It is important to note that the "B" list contributories are only liable to pay that part of the residue which relates to debts incurred in their time. In a voluntary liquidation the list of contributories is made by the liquidator on his own responsibility, whereas when the liquidation is under supervision of the court, and the supervision order states the manner in which the list of contributories is to be drawn out, the liquidator shall have to follow these directions. In the absence of directions to that effect, the same rule as in the case of voluntary liquidation would apply.

In the case of compulsory liquidation, the court settles the list of contributories (Sec. 184).

### **Duties of the Liquidator**

It is the duty of the liquidator, whether in "voluntary", "supervision" or "compulsory" liquidation, to pay the debts of the company in the following order:—

- (1) to pay secured creditors out of the proceeds of their securities;
- (2) to pay costs of liquidation;
- (3) to pay all preferential creditors, as per Sec. 230;
- (4) the balance is then to be distributed among the ordinary creditors in the form of dividends of so many annas in the rupee, and the surplus would then be utilized towards repayment of contributories' accounts according to the value of their shares. In the last case, if there are shareholders who are preferential as to capital, they would naturally have to be paid out first in full, before other shareholders are paid.

### **Preferential Payments**

The following debts in a winding up, whether "voluntary", "supervision" or "compulsory", shall be paid in priority to all others:—

- (a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company and having become due and payable within the twelve months next before the

winding up order or the commencement of winding up in case of voluntary liquidation.

(b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before winding up, not exceeding one thousand rupees for each clerk or servant.

(c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months before the winding up.

(d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company.

(e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(f) the expenses of any investigation held in pursuance of clause (iv) of Section 138 of this Act.

All these debts are to rank equally among themselves and as far as assets are sufficient, are to be paid in full. If the assets are insufficient they are to abate in equal proportion. They are also to have priority over the debenture holders having a "floating" charge. Of course, the cost and expenses of the winding up are to be deducted before these debts are paid. These debts are also to have a first charge on goods distrained by the landlord within three months immediately prior to the winding up (Sec. 230).

The advantage of a "supervision order" is that as the liquidation is carried on under the supervision of the court, the liquidator gets the benefit of the court's assistance, and having before him the various directions of the court his work is much simplified.

On the completion of voluntary liquidation the liquidator calls a final meeting of shareholders and places before them his final accounts. These accounts will have to be passed by the shareholders who direct him as to how the books of the liquidator are to be dealt with. In the case of "compulsory" and "supervision" liquidations, the accounts are to be passed and final documents disposed of in such manner as the court directs.

### **Compromises**

With regard to compromises or arrangements that a company can make with its creditors and members, the following provisions have to be noted :—

**Section 153.**—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or

of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors, or on all the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

Here, if the creditors are properly convinced and have come to their decision after giving due consideration to their interests as a class, the court would generally grant its sanction.

Section 153 relates to compromises either before or during winding up, with creditors or members collectively. Section 234, however, which is given below, gives the liquidator power, if the requisite sanction is obtained, to enter into any compromise or arrangement, i.e. either with the creditors or contributories as a class or individually. The section runs as under :—

(1) The liquidator may, with the sanction of the court when the company is being wound up by the court, or subject to the supervision of the court; and with the sanction of an extraordinary resolution of the company in the case of voluntary winding up, do the following things or any of them :—

- (i) pay any classes of creditors in full;
- (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable;
- (iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting or supposed to subsist between the company and a contributory, or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the court and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of these powers.

### **Compulsory Liquidation**

Compulsory liquidation is brought about by a petition to the court, either made by the company itself, or by one or more contributories, or by one or more of the creditors. The petitioner must state in his petition the grounds on which he applies for the compulsory liquidation order. One or more of the following are considered to be the proper grounds for such a petition :—

- (1) that the company has passed a special resolution to that effect ;
- (2) that the company has not done any business for one year since its commencement, or has stopped doing business for the past one year ;
- (3) that the number of its members has sunk below seven, in case of a public company, and below two, in case of a private company ;
- (4) that the company is unable to pay its debts ;
- (5) that the company's statutory meeting has not been held within the proper time, or that the necessary statutory report has not been circulated seven days previous to the meeting ;
- (6) if the court is of opinion that it is just and equitable that the company should be wound up compulsorily.

*Note.*—The statutory meeting, as we have seen in the previous chapter, is the first meeting of shareholders to be held within a period of six months from the date at which the company is entitled to commence business. At this meeting a statutory report has to be presented. This report states the total number of shares allotted and distinguishes them from those allotted for cash and those allotted otherwise than for cash. It also contains the abstract of receipts on account of capital and payment out of capital, with full particulars thereof.

It may be added that to bring the company within the "just and equitable" clause it must be shown that the sub-stream has gone or that a dead-lock has arisen. (*In re Janbazar Mauna Estate, Ltd.*, 58 Cal. 716.) According to the latest decisions, any cause which the court thinks just may be taken as ground for winding up and it is not necessary that the cause urged should be *ejusdem generis* with that of the preceding five clauses. [*Loch v. John Blackwood*, (1924) A.C. 783 ; *Sabapathy Rao v. Sabapathy Press Co. Ltd.*, 48 Mad. 448.]

After the petition is presented to the court, a copy of it is to be served at the registered office of the company ; and the directors of the company should also be supplied with a copy each of the petition. The court then fixes a date for the hearing, when any creditor or contributory has a right to appear, personally or through his lawyer, in order to support or oppose the petition. Those desirous of doing either should give previous notice. If at the hearing the court is satisfied that there are no grounds for winding up, it will reject the petition and make the petitioner pay the costs. But if the court is satisfied that a ground is made out for compulsory liquidation, it will pass a winding up order. The company should send a copy of the order to the registrar of joint stock companies. The order should also be advertised in the local official *Gazette*. The court will then appoint an official liquidator, who calls upon the directors and officers of the company to furnish him, within a certain time, with a copy of the statement of affairs of the company, a summary of which statement should be printed and sent to the creditors and contribu-

tories. The official liquidator then prepares his report, in which he states the capital of the company and the estimated amount of its assets and liabilities. He should also state the causes of the failure of the company and express his opinion on whether it is desirable to institute an enquiry into the promotion, formation, or failure of the company, or into the conduct of its business. This report is known as the "Preliminary Report", and the court on the application of the official liquidator, on the ground of fraud, may order a public examination of the directors and officials of the company, and fix a date for that purpose. In this examination, the official receiver, the liquidator, creditors and contributories have a right to take part. The court has the right to ask these directors and officials any questions it thinks necessary which they will be compelled to answer. These answers should be taken down in writing, read to them at the conclusion of their examination and their signatures obtained. These answers are then available to be used against them in future as evidence in civil proceedings. It may be added that the usual rule of evidence, which lays down that no person is bound to answer any question which is likely to incriminate him, applies here also.

Very often the official receiver is appointed liquidator, in which case he will be called the "Official Receiver and Liquidator." The remuneration of the liquidator is fixed by the court in a compulsory liquidation, and by the company in a voluntary liquidation. The remuneration may be either payable in a lump sum, or in monthly payments, or as is usually the case, in the form of a commission of 1% on the total receipts and another 1% on the total money paid away by way of dividends. This is done to encourage the liquidator to realize the largest possible amount, to be economical in his expenditure, and to pay the largest amount by way of dividends.

With regard to contributories, it may be added that the amount due from a contributory, as a contributory, is a new and a separate liability, and, therefore, a contributory cannot set off a debt due to him from the company against calls made against him, either by the company before liquidation, or by the liquidator in winding up [Sec. 156 (7)].

A sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

With regard to the making of calls, the liquidator, in a voluntary winding up, exercises the powers of the court under the Act both for settling the list of contributories, as we have seen above, and also

for making calls. The list of contributories, as prepared by the liquidator, is *prima facie* evidence of the liabilities of the persons named therein. It may, however, be noted here that in order to enforce this, the "voluntary" liquidator would have to file suits for the recovery of the amounts, as laid down in Section 216, and it is for the court to determine the question as to it may seem just. In the case of a compulsory liquidation, the court reserves to itself the entire power of rectifying the register of members, and no call can be made by the official liquidator, without the special sanction of the court.

After the affairs of a company are completely wound up, the court will make an order that "the company be dissolved from the date of the order." The liquidator then has to report the order, within fifteen days of the making thereof, to the registrar, who would make an entry in his books as to the dissolution of the company.

### RECONSTRUCTION AND AMALGAMATION

Where the compromise or arrangement was made for the purpose of amalgamation or reconstruction or absorption under the old law, as it stood, the companies had frequently to resort to winding up, as there existed no means of avoiding it. In order to avoid this and to simplify the process of reconstruction or amalgamation and absorption, the Greene Committee of 1925-26 strongly recommended in England that a section such as Secs. 153A and 153B of the Indian Companies (Amendment) Act of 1936 should be inserted in the English Companies Act; with the result that sections similar to the above sections were inserted in the English Act, which we adopted thereafter. The method as laid down now by these new sections of our Act makes, in the case of an amalgamation of companies for the preservation of the name and the goodwill of the company or companies concerned; and at the same time it avoids winding up. This method also saves an amount of unnecessary expenditure which the compulsory winding up of the absorbed company through the usual process of winding up involved. Thus a compromise as laid down by Secs. 153A and 153B can be carried out and applied to compromises in case of companies not in the course of being wound up. Here, if, after going through the process as laid down in Sec. 153 which we considered above, an application is to be made to the court under the said section for the sanction of the compromise or arrangement proposed between a company and any persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been made for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking, or the property of any company concerned in the scheme is to be transferred to another company, the court is authorized to make one or more of the orders

as we have stated below. Here it may be added that the company transferring is called the "transferor company" and the other company to whom the undertaking or property is to be transferred is known as the "transferee company."

The court is authorized to make provisions for any or all of the following matters :—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;

(d) the dissolution, without winding up, of any transferor company ;

(e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement ;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out. [Sec. 153A (1)].

When the order under Sec. 153A (1) provides for a transfer of property or liabilities, the said property shall be transferred to and vest in, and those liabilities shall be transferred to and become liabilities of, the transferee company. In the case of any property which is directed by the order to be free from any charge which is, by virtue of the compromise or arrangement, to cease to have effect, the same shall be free [S. 153A (2)]. A certified copy of the order has to be delivered to the registrar for registration within 14 days after the completion of same. If default is made in complying with this, the company and every officer of the company knowingly and wilfully in default shall be liable to a fine not exceeding Rs. 50. The property under this Section includes property, rights and powers of every description, and liabilities will include duties. The word "company" as used in Sec. 153 (4) will not include any company other than a company within the meaning of the Indian Companies Act.

If a scheme or contract which involves the transfer of shares or any class of shares in a company (i.e. the transferor company) to any other company, whether the said company is a company within the meaning of this Act or not, has within four months after the making of the offer by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given, the transferee company shall, unless on,

an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme of the contract, the shares of the approving shareholders are to be transferred to the transferee company. In a case where, however, any such scheme or contract was approved at any time before the commencement of the Indian Companies (Amendment) Act of 1936, the court has the power at its discretion, by an order on an application made to it by the transferee company within two months after the commencement of that Act, to authorize notice to be given under this section at any time within fourteen days after the making of this order. In such a case Sec. 155B shall apply, except that the terms on which the shares of the dissenting shareholders are to be acquired shall be such terms as the court may by the order direct, instead of the terms provided by the scheme or contract. When a notice has been given by the transferee company under Sec. 153B and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of that notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of Sec. 153B the company is entitled to acquire. Upon this the transferor company must register the transferee company as the holder of its shares. All the money received by the transferor company under this section must be paid into a separate bank account and any other sums or any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other considerations were received. The dissenting shareholder here includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

### **Amalgamation or Reconstruction in a Voluntary Winding Up**

In a case of amalgamation in connection with voluntary winding up or reconstruction, Sec. 208C (old S. 213) is the most convenient section. This section runs as follows:—

(1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this



section called the transferee company) the liquidator of the first mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereinafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the court, the special resolution shall not be valid unless sanctioned by the court.

(6) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration shall apply to all arbitrations in pursuance of this section (Amending Act, 1936).

This improvement saves considerable delay, inconvenience and expenses which are involved in bringing about the winding up of one company with a view to amalgamate with another. Now, as will be seen above, it is laid down that when a compromise or arrangement has been proposed in connection with the reconstruction of any company or companies or the amalgamation of any two or more companies, and under the Scheme the whole or any part of the undertaking or property of any company is to be transferred to another, the court may either by the order sanctioning the compromise or by any subsequent order make provision for all or any of the following:—

- (a) the transfer to the transferee company of the whole or any part of the undertaking and properties or liabilities of the transferor company;
- (b) the allotting or appropriating by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are

- to be allotted or appropriated by that company to or for any person ;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;
  - (d) the dissolution, without winding up, of any transferor company ;
  - (e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement ;
  - (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

When the order under the above Section 153A provides for the transfer of property or liabilities the said property shall vest and the liability shall be transferred to the transferee company, and where the order directs that any property which is subject to a charge shall be freed from that charge by virtue of a compromise, the said charge shall cease to have effect. All these orders have to be delivered for registration to the registrar of companies within seven days after making of the order.

In connection with the above it should be noted that the scheme or contract involving the transfer of the shares in a transferor company has to be passed by the majority of nine-tenths of the value of the shares affected and the transferee company may within two months of the expiry of the first four months of the making of the offer or the compromise which was accepted as above call upon any dissenting shareholder to give up the shares on the same terms as the assenting shareholders by a notice. The dissenting shareholder is given one month after this notice to apply to the court and the court may order otherwise. Failing that, the dissenting shareholder would have to permit the transferee company to acquire his shares on the terms on which under the original scheme of contract the shares of the approving shareholders are to be transferred to the transferee company.

The forms of proxies used by shareholders when they wish another shareholder to be empowered to vote on their behalf, or by a creditor to empower another creditor, may be either general or special.

### GENERAL PROXY

I....., of....., a creditor (contributory) hereby appoint..... to be.....general proxy to vote at the meeting of creditors (or contributories) to be held in the above matter on the.....day of.....19.....

(Signature)

Signature of Witness :

Address :

**Certificate to be signed by persons other than creditor (contributory) filling up the above proxy.**

I....., of....., being a..... hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above named..... and in his presence before he attached his signature (or mark) thereto.

Dated this.....day of.....19.....

(Signature)

### **SPECIAL PROXY**

I....., of....., creditor (or contributory) hereby appoint.....as.....proxy at the meeting of creditors or at any adjournment thereof, to vote.

Dated this.....day of.....19....

(Signature)

Signature of Witness :

Address :

**Certificate to be signed by persons other than creditor or contributory filling up the above proxy.**

I....., of....., being a..... hereby certify that all insertions in the above proxy are in my own handwriting and have been made by me at the request of the above named..... and in his presence before he attached his signature (or mark) thereto.

Dated this.....day of.....19.....

The proxy must be lodged with the official receiver or liquidator not later than the time named for that purpose in the notice convening the meeting at which it is to be used. Every proxy entitling any person to vote at any one meeting of the incorporated company must bear a two-anna stamp.

## CHAPTER XIII

### INSURANCE

#### Life, Fire and Marine

A **CONTRACT** of insurance is a contract between the assured of the insured on the one side and the underwriter or the insurance company on the other, by which the latter, in consideration of a payment called the premium paid by the former, undertakes to indemnify the insured against any loss arising from a contingency upto the sum agreed upon.

Insurance contracts are effected to provide against a number of contingencies; but three of the most important types of insurance contracts which one comes across in business are (1) Life Assurance, (2) Fire Insurance, and (3) Marine Insurance.

The essence of a contract of insurance is that it is a contract of indemnity, i.e. it ought not to be entered into for a mere wager or speculation, but only with a view to provide against the actual monetary loss which the insured is likely to suffer through the happening of the contingency under contemplation. If, for example, a person insures his building against loss by fire for an amount higher than the actual value of the building, he cannot, in case of the destruction of the building by fire, recover more than the actual value of the building. On the same principle, a person insuring property which does not belong to him, or in which he has no pecuniary interest either as a creditor, or in some other capacity, the insurance contract cannot be enforced for want of insurable interest. The other peculiarity of a contract of insurance is that it is to be a contract *uberrimae fidei*, i.e. a contract of absolute faith, and the duty is thrown by law upon the insured to make a full and fair disclosure of every material fact that is likely to affect the judgment of the underwriter or insurance company in deciding what premium to charge or whether to enter into the contract at all. Thus any wrong disclosure, or any statement made fraudulently, negligently, or even innocently through want of knowledge, may vitiate the contract.

#### Life Assurance

Life assurance is defined in Smith's *Mercantile Law* as a "contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payment, undertakes to pay to the person for whose benefit the insurance is made, a sum of money or annuity on the death of the person whose life is insured."

Park, B., says :

"The contract commonly called Life Assurance when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of his life, and when fixed, it is constant and invariable."

The Life Assurance Companies Act, 1909, defines the contract as—

"Policy on human life shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life."

### Insurable Interest

With regard to life assurance, it must also be noted that a person may assure his own life up to any extent, as he is supposed to have an unlimited interest in his own life, or he may assure the lives of those dependent upon him, or through whose death he is likely to suffer a pecuniary loss. Where life assurance is effected for the benefit of a person other than the one whose life is assured, the person for whose benefit the policy is taken out, should be mentioned in such a policy and the amount of assurance should not exceed the pecuniary interest of such a person in the life of the assured at the time of effecting the policy. Therefore, if during the continuance of the life which is assured the interest of the party for whose benefit the policy was effected lapses, he can still recover on the policy. In the case of fire insurance the insurable interest must exist, as per English Common law, both at the time the policy is effected and at the time the property is destroyed or damaged by fire. The present Indian law, however, is different, as we shall see later. In case of marine insurance, on the other hand, there need not exist any insurable interest at the time when the policy is effected, but if the holder of the policy at the time of loss happens to have acquired an insurable interest he can recover on the policy.

Policies effected for the benefit of persons who have no insurable interest are known as "wager policies" or "gambling policies" and are therefore void even where the underwriter has used words as "without further proof of interest than the policy" or "policy proof of interest" or "interest or no interest."

It has been further held that a wife has an insurable interest in her husband's life and *vice versa* ; but a parent has no insurable interest in the life of his child *qua* child ; nor has a child an insurable interest in the life of his parent *qua* parent. A creditor has an insurable interest in the life of a debtor to the extent of his claim, and on the same principle a surety can claim to have an insurable interest in the life of his principal-debtor, etc. It is the practice of life assurance

companies to get a declaration signed by persons who wish to insure their lives. A form known as the *proposal form* is given to the applicant containing a number of questions which he has to answer accurately. The life policies also contain a clause expressly stipulating that any mis-statement in the declaration, whether intentional or innocent, would vitiate the policy. In the case of such declarations it has now been held that if an innocent statement is made at the time of assurance, say with regard to a person's health after consultation with a particular medical adviser, and if the applicant thereafter, during the continuance of the policy, consults another medical adviser and gets to know facts to the contrary on which he immediately reports the facts to the company, that act would not vitiate the policy. If, on the other hand, he conceals the information which is subsequently obtained, it may have the effect of avoiding the insurance.

### Assignability

The policy of life assurance is assignable as a claim under a chose in action and it can be assigned in any form as long as it is clear. It is, however, necessary to give written notice to the assurance company of such an assignment, to make the assignee's title effective against the company, otherwise if the company makes any payment to the assignor after the assignment, without the knowledge of the assignee, the company would be protected. The assignment of the policy carries with it the right to all bonuses and profits. Life Assurance Companies generally maintain a register in which they record notices of assignments but make it clear that such registration does not amount to the acknowledgment of the title of the assignee.

### Proof of Death

In case of policies payable at death, the death of the insured has to be proved. The usual proof is a certificate of death from the registrar and a declaration as to the identity of the person described in such certificate. In case of death by accident or suicide, a copy of the finding of the jury is required. In case of death in a foreign country, the death certificate and the declaration of the medical practitioner who attended with the attestation of the British Consul is required. Death is presumed where it is shown that a person who went abroad, or disappeared, has not been heard of for seven years, nor has he communicated with those he would have communicated with if alive. Where a person was on board a steamer which is proved to have met with a storm and was heard of no more, that fact may be construed to have brought about the death of the person on board.

### Premiums

The premiums, as we have noticed above, are payments made by the assured in consideration of the risk covered by the policy. These

payments may be payable either quarterly or half-yearly, according to arrangement. They are payable within the days of grace, generally allowed by every life assurance policy, or the assured may be required to undergo a second medical examination. On the payment of the first of these premiums the risk on the policy begins and it is covered generally by what is known as the "covering note", which is a provisional agreement to run during the period which has necessarily to elapse before a regular policy can be drawn out. The rates of premium payable on lives under various denominations are generally laid down in the company's prospectus. In cases of what are known as "hazardous occupations" such as those in connection with the Army, Navy, Mining, etc. or residence in a less healthy climate, extra premium is payable. Extra premium may also be charged on the ground of what is known as "climate risk", i.e. where a person who lives in a climate which is considered more healthy, changes his residence for what is considered a less healthy climate, extra premium has to be paid.

### REINSURANCE

If a policy is taken out by one individual on one risk for a large amount, it is usual for life offices to reinsure a portion of that risk with some other insurance company, or companies in league with the former. This is known as reinsurance.

### POLICIES

Policies of life assurance are, as we have seen above, agreements entered into between the insurance company and the assured. The policy may be a whole life policy under which the policy matures at the end of that life, or what is known as an "endowment policy", under which the agreement is that, in consideration of certain premiums paid for a fixed term at fixed intervals, the company undertakes to pay the amount covered by the policy at the end of a specified period in case the person survives that period; but if the person dies before the expiration of that period, the policy falls due and is payable immediately.

The premiums on the policies may be spread over the whole life of the assured, in case of whole life policies, or they may be payable for a fixed term after which the payment of premiums ceases, but the policy runs on till death. This is known as "limited payments policy".

There are also "ascending scale policies" under which premiums of smaller amounts are payable at the start and are gradually raised at agreed intervals. In cases where policies are effected by creditors for a short term of years in order to cover some advance made, they are known as "short term policies". Thus a creditor who effects a short term policy on the life of his debtor, has not only to pay a

premium for a short term, but the premium itself is proportionately lower than that usually charged on a whole life policy.

We have seen in the Chapter on "Partnership" that partners take out "joint life policies" in order to cover the inconvenience caused through a sudden withdrawal of capital by the death of one of the partners.

There are also what are known as "sinking fund policies", where policies are effected by payment of premiums yearly in order to secure a fund at the end of a certain term for the payment of debentures, etc. in connection with joint stock companies with a redeemable debenture debt.

### Surrender Value

This is the value which an insurance company assesses and which it is prepared to pay in case the assured desires to surrender his policy and extinguish his claim upon it. Assurance companies generally pay surrender values only on those policies on which at least three full premiums have been paid. It may, however, be added that, generally speaking, the market surrender values of the policies in Great Britain are higher by 15 to 20 per cent than those offered by the companies. The surrender values are based on the actual premiums paid, and the condition is that the insured must have paid his premiums for a specific period usually from two to three years. Some offices guarantee a percentage of forty to fifty on total premiums paid. As the duration of the policy increases, the assurance company allows a larger surrender value than in cases where a policy is surrendered within a shorter time. Formerly, it was the tendency among life assurance companies to pay a very meagre sum by way of surrender value on the ground that the majority of people who surrendered their policies were of a healthy class, whereas those who had broken down in health during the currency of the policy seldom came in to surrender it. Nowadays, however, owing to competition, the tendency is to allow larger values on surrender policies.

### Loans on Policies

Assurance companies offer facilities by way of advances on policies. This is generally done after a certain number of premiums have been paid, say from two to three years, and within the limit of the surrender value. The loan may be repaid either as agreed, or at the convenience of the borrower, and in case it is not repaid it is kept on with interest accumulation, to be deducted when the policy is finally surrendered or falls due. From the standpoint of a life office there is no investment of a higher value than a loan on the security of the surrender value of their own policy and all offices offer very favourable terms and advance as much as ninety per cent of the surrender value.



## INSURANCE ACT OF 1938 OF BRITISH INDIA

It may be added here that the Insurance Act of 1938, which extends to the whole of British India, now repeals all the previous Acts, viz. the Provident Insurance Societies Act of 1912, the Indian Life Assurance Companies Act, 1912 and the Indian Insurance Companies Act of 1928 and this new Act now consolidates the law relating to the business of insurance in all its branches. The Act increases the supervision exercised over all concerns transacting insurance business of whatever kind in British India, whether these are indigenous concerns or external companies representing in India all branches or agencies and through its agents acting for Lloyds underwriters on the same basis as branches or agencies of such business. Registration is now of general application to all branches of business including provident insurance, and the amount of deposits to be made with the Government has been increased with a view to discourage the formation of companies inadequately financed. In case of life insurance companies, a minimum net sum of Rs. 50,000 as working capital is made compulsory in addition to the deposit which is to be placed with the Government. The Act also provides for these business houses to disclose information required with a view to ensure sound principles of finance in management. Additional powers for inspection of insurance companies are taken with a view to seeing that accurate and punctual submission of returns is universal. External companies are now required to keep in their principal offices in British India the accounts and other documents by which their returns concerning their business in India can be checked. Restrictions are imposed in connection with investment of funds of insurance companies and external concerns or non-Indian insurance companies are required to keep a portion of their assets invested in Indian Government securities. Provisions as to amalgamation, transfer and winding up of insurance companies have been considerably enlarged. Employment of managing agents by insurance companies is now prohibited. Powers are also taken to subject the national of a foreign country to the same restrictions which are imposed in that country on Indian insurance concerns operating there. Payment of rebates and excessive commissions are brought under control and prevented, and insurance agents are licensed. Companies will be supervised by the Superintendent of Insurance who will normally be the Government actuary and the same officer will supervise Provident Insurance Societies. Business on dividing principle is prohibited and provident societies doing this type of business will naturally disappear.

### Registration

It is now laid down that no insurer which means any individual or unincorporated body of individuals or body corporate of any country

(other than British India carrying on business in India and also any person who in British India acts as the agent or underwriter of the members of the Society of Lloyds) can, after the commencement of this Act, carry on any class of insurance business in British India unless the insurer has obtained from the Superintendent of Insurance a certificate of registration. Thus all insurance concerns are brought under registration. In case of non-Indian insurers having a place of business in British India the Superintendent of Insurance shall withhold registration, or cancel it if already made, after he is satisfied that in the country in which such insurer has his principal place of business or domicile Indian nationals are debarred by the law or practice of the country relating to, or applying to, insurance from carrying on the business of insurance. The registration is of course subject to cancellation if the regulations and requirements of the Act are broken or not complied with at any time.

### REQUIREMENTS AS TO CAPITAL

The Insurance Act lays down as follows in connection with the capital requirements of an insurance concern doing business in British India or who wish to commence business here.

#### Deposits

Sec. 7.—(1) Every insurer not being an insurer specified in sub-clause (c) of clause (8) of section 2 shall, in respect of the insurance business carried on by him in British India, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government cash or approved securities, estimated at the market value of the securities on the day of deposit, of the amount hereafter specified, namely:—

- (a) where the business done or to be done is life insurance only, two hundred thousand rupees;
- (b) where the business done or to be done is fire insurance only, one hundred and fifty thousand rupees;
- (c) where the business done or to be done is marine insurance only, one hundred and fifty thousand rupees;
- (d) where the business done or to be done is accident and miscellaneous insurance including workmen's compensation, and motor car insurance, one hundred and fifty thousand rupees;
- (e) where the business done or to be done includes life insurance and any one of the three classes specified in clauses (b), (c) and (d), three hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;
- (f) where the business done or to be done includes life insurance and any two of the three classes specified in clauses (b), (c) and (d), four hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;
- (g) where the business done or to be done includes life insurance and all three classes specified in clauses (b), (c) and (d), four hundred and fifty thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;
- (h) where the business done or to be done does not include life insurance but includes any two of the classes specified in

clauses (b), (c) and (d), two hundred and fifty thousand rupees;

- (i) where the business done or to be done does not include life insurance but includes all three classes specified in clauses (b), (c) and (d), three hundred and fifty thousand rupees; and

- (j) where the business done or to be done is marine insurance relating to country craft or its cargo, ten thousand rupees only.

(2) Where the insurer is an insurer specified in sub-clause (c) of clause (9) of section 2, he shall be deemed to have complied with the provisions of this section as to deposits, if in respect of any class of insurance business transacted by him in British India under a standing contract of the nature referred to in sub-clause (c) of clause (9) of section 2, a deposit of an amount one and a half times that specified in sub-section (1) as the deposit for that class of insurance business has been made in the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government in cash or approved securities estimated at the market value of the securities on the day of deposit by or on behalf of the underwriters who are members of the Society of Lloyd's with whom he has his standing contract.

(3) Where the deposit is to be made by an insurer incorporated before, or carrying on the business of insurance in British India before, the 27th day of January, 1937, the deposit referred to in sub-section (1) may be made in not more than seven instalments, of which the first shall be not less than one-fourth of the total amount of the deposit and shall be paid before the application for registration is made, the second shall be not less than one-sixth of the balance of the deposit and shall be paid before the 1st day of January, 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment and shall be paid before the 1st day of January of each succeeding year:

Provided that in the case of insurers carrying on life insurance business only, the deposit may be made in not more than ten instalments, of which the first shall be not less than one-fourth of the total amount of the deposit, and shall be paid before the application for registration is made, the second shall be not less than one-ninth of the balance of the deposit, and shall be paid before the 1st day of January 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment, and shall be paid before the 1st day of January of each succeeding year.

(4) Notwithstanding anything contained in sub-section (3), in the case of an insurer not being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit referred to in sub-section (1) shall be made in two instalments of which the first shall be not less than one-half of the total amount of the deposit and shall be made before the application for registration is made, and the second shall be made before the expiry of one year from the date of registration.

(5) Where the deposit is to be made by an insurer neither incorporated before, nor carrying on insurance business in British India before, the 27th day of January, 1937, the deposit may be made in instalments of not less than one-fourth the total amount before the application for registration is made, not less than one-third the balance before the expiry of one year from the commencement of business in British India, and not less than one-half the residue before the expiry of two years from the commencement of business in British India, and

the balance before the expiry of three years from the commencement of business in British India :

Provided that in the case of any insurer not being an insurer specified in sub-clause (a) (4) or sub-clause (b) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit shall be made in full before the application for registration is made.

(6) No class of insurance business in addition to the class or classes in respect of which an insurer is already liable to make a deposit under sub-section (1) or sub-section (2) shall be undertaken by the insurer until the deposit to which he is already liable has been made in full, and the additional deposit required in respect of the additional class of business or so much thereof as under the provisions of sub-section (3), (4) or (5) is to be made before the application for registration, has also been made in full.

(7) Securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 1912, shall be transferred by him to the Reserve Bank of India and shall, to the extent of their market value on the day of the first deposit made in compliance with this Act, be deemed to be deposited under this Act in respect of the life insurance business of the insurer.

(8) A deposit made in cash shall be held by the Reserve Bank of India to the credit of the insurer and shall be returnable to the insurer in cash in any case in which under the provisions of this Act a deposit is to be returned ; and any interest accruing due and collected on securities deposited under sub-section (1) or sub-section (2) shall be paid to the insurer, subject only to deduction of the normal commission chargeable for the realization of interest.

(9) The insurer may at any time substitute for securities lodged with the Bank under this section other approved securities of equal value at the market rate prevailing at the time of substitution, and the Reserve Bank of India shall, if so requested by a depositor, invest in approved securities the whole or any part of a deposit made originally in cash or the whole or any part of cash received by the Bank on sale of or on the maturing of securities lodged by the depositor.

(10) If any part of a deposit made under this section is used in the discharge of any liability of the insurer, the insurer shall deposit such additional sum in cash or approved securities as will make up the amount so used. The insurer shall be deemed to have failed to comply with the requirements of sub-section (1), unless the deficiency is supplied within a period of two months from the date when the deposit or any part thereof is so used for discharge of liabilities.

With reference to the above deposits it is laid down that they shall not be susceptible to any assignment or charge nor shall they be available for the discharge of any liability of the insurer other than the liabilities arising out of policies of insurance issued by the insurer so long as any such liability remains undischarged. This deposit shall also not be liable to attachment in execution of any decree obtained by a policyholder in respect of a debt due on a policy which the policyholder has failed to realise in any other way. In the case of life insurance deposits they shall be only available for discharge of any liability of the insurer in connection with life policies only. This deposit is repayable when the insurer ceases to carry on business in British India or any class of business in respect of which the deposit

has been made, provided all liabilities in British India in respect of business of that class have been satisfied or otherwise provided for. For this purpose an application has to be made to the court, and the court if satisfied on this point would order the return of the said deposit.

In case of sterling securities deposited in the Bank the Insurance Rules, 1939, provide that they shall be sent by the depositor with a covering letter to the Manager, Reserve Bank of India, London, and shall be held by the London office of the Bank on behalf of the Calcutta office of the Bank. Deposits other than in sterling securities must be sent by the depositor with a covering letter to the Manager of the Reserve Bank of India, Calcutta, who shall hold them in the Calcutta office of the Bank. The depositor must duly transfer the said securities to the Bank. The Bank in return will issue a certificate to the depositor as to this and shall also send a statement in the form required by the Act to the Superintendent of Insurance. In the case of sterling securities their market value is to be counted at 1s. 6d. to the rupee (Rule No. 5). On the maturity of any of the securities, the depositor may require the Bank in writing within six weeks to collect the discharge value of the said securities and hold the amount in cash to the credit of the depositor or invest it in securities specified by the depositor (Rule No. 7). With reference to cash deposits the Bank shall pay no interest. In case of other securities the interest or dividend on sterling securities must be remitted by the London office of the Reserve Bank of India to the Calcutta office at the Telegraphic Transfer Rate on India prevailing on the date of realization of the interest or dividend. In the case, however, of interest or dividends on securities other than sterling securities, the amounts received shall be transmitted by the Calcutta office to the depositor at his Indian office, as specified by the latter. If the depositor's office is situated at a place where there is an office of the Reserve Bank or a branch office of the Imperial Bank of India, remittance must be sent by means of a Government Draft, whereas in other cases by a Security Deposit Interest Payment Draft on the nearest Government Treasury, after deducting commission of annas four on every sum of Rs. 100 or part thereof. Withdrawals and payments from deposits and purchases of securities cannot be made by the depositor except as provided by the Act and the Banks are not bound to return such securities deposited by them but may substitute thereof new types of securities of the same description and amount. In this case the Bank shall be entitled to charge for the purchase of securities any brokerage payable by the Bank in respect of such purchase (Rule No. 9.). The Superintendent of Insurance shall be entitled, free of any fee, to inspect or to require from the Bank any information relating to any security deposited with the Bank under the Act.

### **Accounts**

With reference to accounts, the Insurance Act, Section 10, lays down as follows :—

(1) Where the insurer carries on business of more than one of the classes specified in clauses (a), (b), (c) and (d) of sub-section (1) of section 7 (i.e. *Life, Fire, Marine or Workmen's Compensation*), he shall keep a separate account of all receipts and payments in respect of each such class of insurance business.

(2) Where the insurer carries on the business of life insurance, the excess of receipts over payments in respect of such business shall be carried to and shall form a separate fund to be called the life insurance fund and the deposit made by the insurer in respect of life insurance business shall be deemed to be part of such fund.

(3) The life insurance fund shall be as absolutely the security of the life policyholders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly save as provided in section 49 for any purposes other than those of life insurance.

### **Audit**

The balance sheet and profit and loss and profit and loss appropriation account of every insurer in respect of all insurance business transacted by him in India shall be audited annually according to regulations contained in the Indian Companies Act, 1913, and the auditor shall have the same powers and functions in connection with the discharge of his duties and the same liabilities and penalties as imposed by the Indian Companies Act on auditors of companies.

### **Actuarial Report**

Every insurer carrying on life insurance business shall in respect of the life insurance business transacted by him in India and in the case of an insurer domiciled or incorporated in India, in respect of life insurance business transacted by him, cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him once at least in every five years, including a valuation of his liabilities in respect thereto and cause an abstract of the report of such actuary to be made in accordance with the regulations contained in the Act. To this abstract a certificate signed by the principal officer of the insurer shall be appended to the effect that full and accurate particulars of every policy under which there is a liability either actual or contingent, have been furnished to the actuary for the purpose of investigation (Sec. 13).

### **Register of Policies and Register of Claims**

Every insurance company must now keep a register of policies and register of claims. The register or record of policies must

contain a record of every policy issued by the insurer, the name and address of the policyholder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice. The register or record of claims must contain the date of the claim, the name and address of the claimant and the date on which the claim was discharged or rejected (Sec. 14).

### Investment of Assets and Restriction on Loans

In connection with this, Sections 27 and 28 of the Act lay down as follows :—

**Sec. 27.**—(1) Every insurer incorporated or domiciled in British India shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than fifty-five per cent of the sum of the amount of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer for loans granted by him on policies of life insurance, in the manner following, namely, twenty-five per cent of the said sum in Government securities and a further sum equal to not less than thirty per cent of the said sum in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

**Explanation.**—The provisions of this sub-section shall apply also to insurers incorporated in or domiciled in the United Kingdom.

(2) An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than the sum of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer on loans granted by him on policies of life insurance in the manner following, namely, thirty-three and one-third per cent of the said sum in Government securities, and the balance in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

(3) An insurer carrying on business at the commencement of this Act to whom sub-section (1) or sub-section (2) applies shall before the expiry of four years from the commencement of this Act invest the total amount required to be invested by those sub-sections in the manner required thereby :

Provided that of such total amount the insurer shall have invested not less than one-fourth in securities of the nature specified in sub-section (1) before the expiry of one year, not less than one-half before the expiry of two years, and not less than three-fourths before the expiry of three years from the commencement of this Act.

(4) The assets required by this section to be held invested by an insurer to whom sub-section (2) applies shall be held in trust for the discharge of claims of the nature referred to in sub-section (2) and shall be vested in trustees resident in British India and approved by the Central Government by an instrument of trust which shall be executed by the insurer and approved by the Central Government and shall

define the manner in which alone the subject-matter of the trust shall be dealt with.

**Explanation.**—Sub-sections (2) and (4) shall apply to an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose Governing Body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom.

**Sec. 28.**—(1) Every insurer registered under this Act carrying on the business of life insurance, not being a provident society, shall twice in every year, namely, within fourteen days of the 30th day of June and within fourteen days of the 31st day of December, submit to the Superintendent of Insurance a statement showing as at the said dates the assets held invested in accordance with section 27 and such statement shall be certified by the principal officer of the insurer.

(2) The Superintendent of Insurance shall be entitled at any time to take such steps as he may consider necessary for the inspection or verification of the assets invested in compliance with section 27 and the insurer shall comply with all requisitions made by the Superintendent in that behalf.

### Prohibition of Loans

With reference to restrictions of loans, Section 29 lays down as follows :—

No insurer shall grant loans or temporary advances either on hypothecation of property or on personal security or otherwise, except loans on life policies issued by him within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer if a company, or where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, officer or partner holds the position of a director, manager, managing agent, actuary, officer or partner :

Provided that nothing herein contained shall apply to loans made by an insurer to a banking company :

Provided further that every existing loan to any director, manager, managing agent, auditor, actuary, officer or partner, notwithstanding any contract to the contrary, shall be repaid within one year from the commencement of this Act, and in case of default, such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of one year from the commencement of this Act :

Provided further that nothing in this section shall prohibit a company from granting such loans or advances to a subsidiary company or to any other company of which the company granting the loan or advance is a subsidiary company.

### Managing Agents

As we have seen already, managing agents are not allowed to be employed by insurance companies and in this connection Section 32 lays down as follows :—

(1) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business.

(2) Where any insurer engaged in the business of insurance before the commencement of this Act employs a managing agent for the conduct of his business, then, notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, and notwithstanding



anything to the contrary contained in the Articles of the insurer, if a company, or in any agreement entered into by the insurer, such managing agent shall cease to hold office on the expiry of three years from the commencement of this Act and no compensation shall be payable to him by the insurer by reason only of the premature termination of his employment as managing agent.

(3) After the commencement of this Act, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the Articles of Association of an insurer being a company, no insurer shall pay to a managing agent and no managing agent shall accept from an insurer as remuneration for his services as managing agent more than two thousand rupees per month in all, including salary and commission and other remuneration payable to and receivable by him, for his services as managing agent.

### Commission and Rebates

With reference to commission and rebates, the following restrictions are imposed by Sections 40 and 41 :—

**Sec. 40.**—(1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent licensed under section 42 or a person acting on behalf of an insurer who for the purposes of insurance business employs licensed insurance agents.

(2) No insurance agent licensed under section 42 shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of life insurance business, forty per cent of the first year's premium payable on any policy or policies effected through him and five per cent of a renewal premium, or, in the case of business of any other class, fifteen per cent of the premium :

Provided that insurers, in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent of the first year's premium payable on any policy or policies effected through them and six per cent of the renewal premiums.

(3) Nothing in this section shall prevent the payment under any contract existing prior to the 27th day of January, 1937, of gratuities or renewal commission to an insurance agent or to his representatives after his decease in respect of insurance business effected through him before the said date.

**Sec. 41.**—(1) No person shall allow or offer to allow, either directly or indirectly, as an inducement to any person to effect or renew an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person taking out or renewing a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer.

(2) Any person making default in complying with the provisions of this section shall be punishable with fine which may extend to one hundred rupees, unless the default is made by a person effecting or renewing a policy, in which case he shall be punishable with fine which may extend to fifty rupees only.

According to Section 43, every insurer must maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date if any on which his appointment ceased.

### **Policyholders' Directors**

The Act now provides for special directors being elected by policyholders who have naturally a greater stake in the company than the shareholders themselves in many cases. This is laid down by Section 48 (1) as follows:—

Where the insurer is a company incorporated under the Indian Companies Act, 1913, and carries on the business of life insurance, not less than one-fourth of the whole number of the directors of the company shall be persons having the prescribed qualifications and holding policies of life insurance issued by the company, and shall be elected to the Board of Directors of the company in the prescribed manner by the holders of policies of life insurance issued by the company.

With reference to the election of Policyholders' Directors, special rules have been framed, under the Insurance Rules of 1939. A person who wishes to be a candidate eligible for election of Policyholders' Directors must hold, otherwise than by way of assignment or transfer, one or more policies of life insurance issued by the company. Such policies must be either whole life policies or endowment life insurance policies, which are not encumbered in any way. The total sum assured by such policies held by a candidate, including bonuses that may have attached to them before the date of election, must not be less than Rs. 2,000, where the company has at that date been carrying on life insurance business for not less than 5 years, and not less than Rs. 1,000 in other cases. If the company has been carrying on life insurance business for more than two years, each of the policies shall have been in force for not less than one, two or three years, according as the company has at the date of election been carrying on life insurance business for not more than 5 years, for more than 5 but not more than 8 years, or for more than 8 years. In addition to these requirements a candidate must not be a director (other than an elected director of the company), manager, legal or technical adviser, managing agent, insurance agent or employee of any insurer, or an employer of an insurance agent. A further requirement is that from the date the requisite value of policies is not held by the person, or when the person ceases to do so he ceases to be a director, or where he holds any of the above disqualifying offices or employment, he also ceases to be a Policyholders' Director (Rule No. 13).

At the election of Policyholders' Directors every policyholder, who wishes to attend the meeting, must apply to the company for a certificate of admission not later than fifteen days before the date of the meeting and the company on being satisfied that the applicant

holds a policy of life insurance issued by the company, shall issue a certificate at least six days before the date of the meeting. When such a certificate is applied for by post, it must be sent to the address of the policyholder, or if applied for in person, be delivered only on production of the relevant policy. A certificate of admission is not transferable. No person other than those whose presence is necessary for the conduct of the meeting shall be admitted to the meeting, unless he produces the admission certificate. The votes shall be given either personally or through proxy (Rule No. 14).

The directors elected in accordance with these regulations shall, as regards retirement from office and all other matters, be subject to the same rules and regulations as the other directors of the company. In the event of a casual vacancy among the directors elected by policyholders, the remaining directors may fill in the vacancy by appointing a duly eligible policyholder as a director and the person so appointed shall be subject to retirement at the same time as the director in whose place he is appointed.

#### **Business on Dividing Principle Prohibited**

The new Insurance Act prohibits business on what is called the dividing principle, i.e. where the policyholder does not receive a fixed amount on his policy, as in cases of ordinary life insurance policies, but the amount received entirely or partly depends on the results of collections made from the members of the society, who have combined, or on the results of the distribution of policy premiums within certain time limits of certain sums. The Act says that no insurer shall after the commencement of the Insurance Act, 1938, begin, or after three years from that date continue to carry on, any business upon the dividing principle, "provided that nothing in this section shall be deemed to prevent an insurer from allocating bonuses to holders of policies of life insurance as a result of a periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses or otherwise, and provided further that an insurer who continues to carry on insurance business on the dividing principle after the commencement of this Act shall withhold from distribution a sum of not less than forty per cent of the premiums received during each year after the commencement of this Act in which such business is continued so as to make up the amount required for investment under section 27." On the expiry of the period of three years as referred to above, or earlier if the insurer ceases to carry on business on the dividing principle, the insurer must forthwith cause an investigation to be made "by an actuary, who shall determine the amount accumulated out of the contributions received from the holders of all policies to which the dividing principle applies and the extent of the claims of those policyholders against the realisable assets of the insurer, and shall, before the expiration of six months from the date

on which he is entrusted with the investigation, make recommendations regarding the distribution, whether by cash payments or by the allocation of paid-up policies or by a combination of both methods, of such assets as he finds to appertain to such policyholders; and the insurer shall, before the expiry of six months from the date on which the actuary makes his recommendations, distribute such assets in accordance with those recommendations."

### **Insurance Agents' Commissions and Rebates**

In this connection it is to be noted that the Insurance Act now brings under control and places restrictions on persons acting as canvassers and commission agents as well as on rebates, commissions or any gratification paid to any person in order to induce him to take out a policy, or insure his own life. After the expiry of six months from the commencement of the Insurance Act of 1938 no person can take or contract to pay any remuneration or reward by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or a person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents. It will thus be interesting to note that an **insurance agent** is defined as 'an insurance agent licensed under section 42 being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business.' It may be added here to explain the definition that under section 42 "the Superintendent of Insurance or an officer authorised by him in this behalf has power to issue licences to such agents on payment of a prescribed fee. The licence issued shall remain in force for twelve months only from the date of issue and shall be renewed from year to year.'

No person can be appointed as an **insurance agent** who is a minor, or of unsound mind, or guilty of criminal misappropriation or criminal breach of trust or cheating, or forgery or an abettor of or attempt to commit any such offence, unless at least five years have elapsed since the completion of the sentence imposed and under the circumstances the Superintendent of Insurance thinks that the disqualification may cease to operate.

The Act further lays down that in case of life insurance no **insurance agent** shall be paid a remuneration in any form exceeding forty per cent of the first year's premium payable on any policy or policies and five per cent of a renewal premium, or in the case of business of any other class, fifteen per cent of the premium. However, insurers in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent of the first year's premium payable on any policy or policies effected through them and six per cent of the renewal premiums (S. 40). In addition to this the Act further lays down that

no person should allow or offer to allow either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person take such a rebate under the said circumstances, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer (S. 41). Under this section the person wrongfully giving or receiving rebate is punishable with fine which may extend to one hundred rupees in the case of a person or agent inducing and rupees fifty in the case of a person taking out, renewing or continuing the policy.

### Provident Societies

A provident society is defined by the Insurance Act of 1938 as a person who, or a body of persons (whether corporate or unincorporate) which, not being an insurer registered under the Act, carries on the business of insuring the payment, on the happening of any of the following contingencies :—

- (1) The birth, marriage or death of any person or the survival by a person of a stated or implied age or contingency.
- (2) Failure of issue.
- (3) The occurrence of a social, religious or other ceremonial occasion.
- (4) Loss of or retirement from employment.
- (5) Disablement in consequence of sickness or accident.
- (6) The necessity of providing for the education of a dependent.
- (7) Any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

A provident society may also do the business of granting annuities of Rs. 50 or less, payable for a certain period, or a gross sum of Rs. 500 or less either in a lump sum or in instalments over a certain period.

### Provident Societies and Dividing Business

The provident societies are also prohibited on the same footing as other insurance companies from undertaking any form of insurance which falls within the definition of "dividing business", as referred to above (S. 67).

### Insurable Interest

In the case of provident societies the insurable interest is much extended compared with the insurable interest applicable to ordinary life insurance companies. Here it is laid down that a provident society must not receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium

or contribution or the wife, husband, child, grand-child, parent, brother or sister, nephew or niece of such a person. In ordinary life insurance, insurable interest, as has been noticed in connection with life insurance companies in this chapter, is presumed only in the case of husband and wife, whereas otherwise, except in case of a creditor etc., insurable interest does not exist and has to be strictly proved. In this case, besides the husband and wife, the children, grand-children, etc., are permitted to enjoy the privilege of having an interest in the money insured (S. 68).

### **Registration of Provident Society**

A provident society must, of course, get itself registered, as otherwise it is prohibited from receiving any premium or contribution. For the purpose of registration an application will have to be made, which must be accompanied by:—

- (a) a certified copy of the rules of the society, and when the society is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1886, or under any Act repealed thereby, a certified copy of the Memorandum and Articles of Association or where the society is not such a company a certified copy of the deed or constitution of the society;
- (b) the names and addresses of the proprietors or directors, and the managers of the society, the full address of the registered office of the society, the full address of the principal office of the society in British India, the name of the manager at such office, and the name and address of some one or more person resident in British India authorised to accept any notice required to be served on the society;
- (c) a certificate from the Reserve Bank of India that the initial deposit necessary is duly made;
- (d) a declaration verified by an affidavit that the minimum working capital required by the Act is available; and
- (e) the prescribed fee for registration being not more than two hundred rupees.

The application will be examined by the Superintendent of Insurance, who may refuse to issue a certificate of registration until he is satisfied that the rules of the society comply with the provisions of the Act and that the minimum working capital as required by the Act is available. It may be noted that the Superintendent is also given the power to cancel a certificate if he finds that (1) the society is insolvent or is likely to become so, or (2) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that in his opinion it is in the interest of the policyholders that the society should cease to carry on business; (3) he will also cancel the certificate where the initial deposit and further deposits, if any, as required by the Act, has not been made by the society; or (4) the society has failed to comply with any requirement or provision of the Act and has continued such failure or contravention or contravention

has been conveyed to the society by the Superintendent of Insurance)

In case a provident society has failed to have its registration renewed, the Superintendent of Insurance may, without previous notice and without application to the Court cancel the registration. He can also cancel the registration if the provident society itself applies to him for such cancellation and he is satisfied that the society has ceased to carry on insurance business and that all its liabilities in respect of insurance policies are either satisfied or otherwise provided for (S. 70).

### **Working Capital and Deposit by Provident Society**

No provident society can be registered, unless it has a **paid-up capital** sufficient to provide as **working capital** a net sum of not less than five thousand rupees, exclusive of deposits made under the Act and exclusive in the case of a company of any expenses incurred in connection with the formation of the company.

Besides the above requisites a provident society is required, under the Act of 1938, within one year from such commencement, or, if established after the commencement of the Act before the society applies for registration, to deposit and keep deposited five thousand rupees with the Reserve Bank of India in one of the offices in India of the Bank. The deposit is to be in cash or in approved securities amounting to the market value of securities on the date of deposit to the aforesaid rupees five thousand. Thereafter the society must make in each calendar year a further deposit amounting to not less than one-fifth of the gross premium income for the preceding calendar year. This premium income is to include admission fees and other fees received by the society. The annual deposits are to be made until the total amount of deposits kept with the registrar is rupees fifty thousand.

### **Mutual and Co-operative Life Insurance Companies**

A mutual insurance company is an insurer, being a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which has no share capital and of which by its constitution only and all policyholders are members.

A co-operative life insurance society means an insurer, being a society registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on whose application the society is registered, and all policyholders are members (S. 95).

### **Provision as to Deposit**

Both the mutual insurance companies and the co-operative life insurance societies carrying on the business of life insurance in British

India, are required to deposit and keep deposited in the Reserve Bank of India in India, a sum of rupees two hundred thousand in cash or in approved securities estimated at the market value of the securities on the day of deposit. They are allowed to deposit this amount in instalments of which the first shall be a payment made before or at the time of application for registration, of not less than rupees twenty-five thousand, or such sum as with any deposit previously made by the insurer under the provisions of the Indian Life Assurance Companies Act, 1912, brings the amount deposited upto not less than rupees twenty-five thousand, and the subsequent instalments shall be annual instalments made before the expiry of each subsequent calendar year of an amount in cash or in approved securities equal to not less than one-third of the gross premium income received in the previous calendar year.

#### **Insurance Companies Incorporated or Domiciled Outside British India or United Kingdom**

In the case of such companies the provision is that they shall at all times invest and hold invested assets equivalent to not less than the sum of their liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liabilities on policies of life insurance maturing for payment in India, less the amount of any deposit that they may have made under section 7 of the Act, and less any amount due to the insurer on loans granted by such companies on policies of life insurance. 33.1/3 per cent of the said sum has to be invested in Government securities and the balance in Government securities or other approved securities or securities guaranteed as to principal and interest by the Government of the United Kingdom (Sec. 27).

These companies are also required to keep at their principal offices in British India such books of account, register and documents as will enable the accounts, statements and abstracts which are required to be made by the companies by the Act to furnish to the Superintendent of Insurance, in respect of insurance business transacted by them in British India to be compiled, and if necessary, checked by the Superintendent of Insurance (Sec. 64).

#### **FIRE INSURANCE**

A contract of fire insurance is a contract by which the insurance company, or the underwriter, or the insurer undertakes, for a consideration in the form of a payment of money either in a lump sum or in instalments, to indemnify the insured against the consequences of a fire, or the loss or injury as arising therefrom during an agreed period and upto a certain amount. The contract is to be found embodied in a document known as the "policy of fire insurance".

Here also, as in the case of life and marine insurance, the insured



must have an insurable interest in the article insured, i.e., he must be in such a position that by loss, destruction, or damage of the property he stands to suffer a pecuniary loss. In short, all the principles of insurable interest applicable in cases of marine insurance apply to fire insurance.

### The Policy

It has been held in various English cases that it is not necessary to have an actual formal policy in order to constitute a valid contract of fire insurance. A slip initialled by a broker with a view to the preparation of a policy may be taken as a contract of insurance and it has also been held that a mere proposal to insure followed by an acceptance of the proposal in itself constitutes a valid contract of fire insurance even though no payment by way of fire insurance premium has been made. The general practice is that after the proposal by the owner of the property for insurance and after its acceptance a document called "cover note" is handed to the insured. This cover note is given as a protection during the interval of time covered by the proposal and the consideration of that proposal by the company or the underwriter. It has been held that such a cover note would be sufficient to enable the holder to claim damages should a fire occur during the interval. In short, the cover note or an *interim* protection note constitutes a binding contract for the time mentioned in it.

### The Risk

The risk on fire policy commences from the moment of time the cover note, or the deposit receipt, or the *interim* protection note is given and continues for the term covered by the contract of insurance. It is the practice to allow a certain number of days as days of grace within which a fire policy may be renewed after the expiration of the term. In such a case, if a fire should occur within such a time the insured would be entitled to recover damages. The days of grace only apply when the insured has the intention to renew the policy, failing which, the policy expires on the day the period runs off. If, however, it is expressly stipulated in the policy that unless the renewal premium is paid and the renewal risk is accepted the insurance would expire, the insured would not be able to recover in a case where a fire occurs after the expiration of the term and before the acceptance by the fire insurance company of a proposal for further insurance.

### Loss by Fire

The question as to what is the meaning of the expression "loss by fire" has frequently arisen. Of course, the literal meaning, viz. damage, loss or deterioration through ignition is included, but much more than that it covered. In India the special Municipal Acts of the different provinces lay down that damage by fire within the

meaning of policies in India, would include any damage done in the exercise of powers, in case of an outbreak of fire, by a magistrate, or members or secretaries of committees, or members of a fire brigade by way of breakage, pulling down of premises and through any measures that may have to be taken in case of fire to preserve lives or property. The exact wording of the Bombay Municipal Act of 1888, Section 363, is as follows :--

Any damage occasioned by the fire brigade in the due execution of their duties, or by any police or municipal officer or servant who aids the fire brigade, shall be deemed to be damage by fire within the meaning of any policy of insurance against fire.

It would also include the damage to a property caused through heating which heat has been engendered by some property near it which has caught fire. Of course, pure and simple heating, without there being any ignition of the property itself or anything near it, would not be covered by the expression "loss or damage by fire". In case of lightning, if the actual fire has been caused by such an accident, it would, of course, be covered by the ordinary risk of damage by fire, not otherwise, unless specifically provided for in the policy as is usually done. In short, losses directly caused through fire, i.e. those that are direct consequences of fire, are covered. The others are not covered unless specifically provided for. If the loss is caused through the malicious act of the insured himself he would not be able to recover it; but it would be no excuse for the underwriter to say that the loss was caused through the negligence of the insured.

Fire policies usually cover loss through fire whether caused through lightning, explosion of boilers used for domestic purposes or explosion of gas used for domestic purposes or in a building not used as gas works. They do not include loss through fire caused through spontaneous fermentation, earthquakes, subterranean fire, riot, civil commotion, foreign enemy, military or usurped power, rebellion or insurrection.

### Absolute Good Faith

The contract of fire insurance is a contract *uberrimae fidei*, i.e. a contract based upon absolute good faith, and therefore, the insured must make full and detailed disclosure of all material facts likely to affect the judgment of fire offices in determining the rates of premium or deciding whether the proposal should be accepted.

The description of the property, when asked for, should be correctly given, and all information that may be required as to the class of goods and articles that are kept on the premises or in the surrounding neighbourhood, should be accurately supplied.

### Claims and Average

In case of an outbreak of fire the first care that the insured must take is to give notice to the insurance company. The policies generally

provide for notice in case of an outbreak within a specified time, which clause should be strictly complied with. ~~The claim to be made out~~ should be for the exact value of the goods damaged or destroyed at the date of the fire. In the case of goods partly destroyed or damaged, details as to their value in good condition (and in damaged condition) ought to be made out and furnished to the insurance company. In the case of damage to buildings, the basis of the claim should be the cost of repairs of the damage, with due allowance for the greater value of the new premises over the old. This is, of course, applicable where the policy covers the full value of the property; but in fire insurance the peculiarity is, unlike marine insurance, that the insurance company cannot, where the property is partially insured, claim to pay only a proportional loss, i.e. loss in the proportion in which the amount insured stands to the full value of the property. The company is in fact liable for the whole loss, as far as the amount insured covers that loss, irrespective of the value of the whole property; e.g. if a property is worth Rs. 50,000 and is insured for Rs. 20,000 and the damage has been caused to the extent of Rs. 5,000, the insured can recover his full Rs. 5,000. Policies, however, counteract this advantage from the point of view of the insured by inserting clauses known as "average clauses" under which it is expressly provided that in such cases the loss in proportion to the risk covered on the property can only be claimed. These average clauses have now developed into a number of variations suitable to various circumstances. It may be added here that the fire offices by inserting a clause called "reinstatement clause" reserve to themselves the right to reinstate the property instead of paying in money. This clause goes a long way in practice to prevent rapacious and fraudulent claims being presented.

### Subrogation

Subrogation is a doctrine applicable to both fire and marine insurance, by which the insurer or the underwriter, becomes entitled on his paying compensation to the insured, to claim the advantage of every right of the insured against third parties who may be proved to be responsible for that loss, owing to such third parties' negligence, default, etc. In the words of Brett, L.J.: "As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been, diminished." [*Casellain v. Preston*, (1883) 11 Q.B.D., p. 388.]

To take an instance, it often happens that a lessee takes the lease of a premises for a long period the lease covering repairs to the premises. The lessee under this covenant would be bound to repair the premises even in the case of damage by fire. Now, if the premises have been insured by the landlord and a fire occurs, the landlord can recover the loss immediately from the insurance company or the insurer, and the insurer or the insurance company can in their turn recover the amount from the lessee, because, on their having paid the loss to the lessor, i.e. the landlord, the landlord's rights are subrogated to the insurer.

### **Assignment of Policy**

A fire policy can, according to English Common Law, be assigned only with the consent of the insurer or the insurance company. It is said to be a contract of a personal nature, and therefore a policy of insurance does not pass with the sale or assignment of the property on which it is effected. A transfer or assignment with the consent of the insurance office, as stated above, would only give an effective right to the assignee. In connection with this, Sections 135 and 49 of the Transfer of Property Act, 1882, are important. Section 135 :—

Every assignee, by endorsement or other writing of a policy of marine insurance, or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

#### **Section 49 :—**

Where immovable property is transferred for consideration, and such property or any part thereof is at the date of transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Section 135 virtually states the law as to transfer of a marine policy both in England and India. The only peculiarity to be noticed in the language of this section is in connection with the words "in whom the property in the subject insured shall be absolutely vested at the date of the assignment". These words may mean either that the absolute owner of the property alone can transfer or that any holder of the policy can transfer such interest in the property as may be absolutely vested in him. The latter meaning is presumably aimed at according to the best authorities.

Section 49 deals exclusively with immovable property. Here our Indian law differs from the English. Here, unlike English law, the policy virtually passes to the purchaser on the transfer of the insured property.

## CHAPTER XIV

# MARINE INSURANCE

### DEFINITION

**"MARINE INSURANCE** is a contract whereby the insurer or underwriter undertakes to indemnify the assured in the manner and to the extent thereby agreed, against marine losses, that is to say, losses incidental to marine adventure." The instrument in which the contract of marine insurance is implied, is called a policy. The insurer in marine insurance is known as the underwriter and the person who is thereby indemnified is called the insured.

### Insurable Interest

The essence of a marine insurance contract is that it is a contract of indemnity. This means that by this contract the underwriter agrees to indemnify the insured against losses by sea risks to the extent of the amount insured. The insured in return for this undertaking pays an agreed amount known as the premium. In order, therefore, to suffer a loss the party who insures a particular property must have what is called an insurable interest in the same, i.e. such an interest that in case of loss or damage to the thing insured, the insured must suffer a pecuniary loss. The owner of the ship or cargo has an insurable interest in it; a creditor who has advanced money on such a ship or cargo has an insurable interest to the extent of his claim; a trustee holding anything in trust for another has an insurable interest in such property; an assignee of a bill of lading may insure to the extent of his interest; a shipowner has an insurable interest in the freight unpaid; a consignee or a factor, or agent may have an insurable interest in the ship or the cargo on the safe arrival of which the payment of his brokerage depends, and so on.

### Implied Warranties

In marine insurance there are three implied warranties which the insured is taken to be giving to the underwriter: (1) warranty of seaworthiness, (2) warranty of non-deviation, and (3) warranty of legality of the voyage.

### How Marine Insurance is Effected

Before considering the form of the policy of marine insurance generally accepted all over the maritime world, we might consider the manner in which insurance is generally effected in England and in India. In England, besides the large marine insurance companies

with which we are quite familiar in India, the greatest proportion of the business of marine insurance is done by private underwriters who are members of insurance associations like the Corporation of Lloyds. In case where the insurance is to be effected on the "Lloyds", it is usually done through an insurance broker. It is a contract mainly between the insured and the underwriter. The broker receives instruction from the would-be insured and effects the insurance by communicating that fact to the underwriter on the "Lloyds". When the broker effects insurance with a private underwriter he gets a temporary document made out, known as the "slip", which consists of a simple statement as to the name of the ship, the date, description of the risk, the sum or sums insured and the rate of premiums. The underwriters who undertake the risk as mentioned in the slip initial it, each for the sum he thinks proper to underwrite, until the whole amount is subscribed. The legal effect of the slip as described by Justice Blackburn in *Ionides v. Pacific Fire and Marine Insurance Co.*, (1871) L.R. 6 Q.B. 674, is as follows: "The slip is in practice and according to the understanding of those engaged in marine insurance, complete and final contract between the parties, fixing the terms of insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed without a breach of faith, for which he would suffer in his credit and future business." However, subsequent Acts introduced in England have clearly laid down that valid contracts of marine insurance can only be entered into by means of instruments known as policies which should be duly stamped. It would, therefore, follow that a "slip", as it is not stamped, would not be a valid contract aimed at by the English law. On the "Lloyds", however, a slip initialled by a member of the "Lloyds" would be binding on the member as per the rules of the "Lloyds". It has been further held that where a stamped policy has been made out and executed after a slip, the slip may be looked into for the purpose of ascertaining the intention of the parties to the policy. It has, however, been held that if the contract of insurance is made in a country where no stamp laws are enforced, an action may be maintained upon an agreement to issue a policy, and a specific performance of it may be ordered. [*Bhagwandas v. Netherlands Indian Sea and Fire Insurance Co. of Batavia*, (1888) 14 App. Cas. 83, P.C.]

Very often, instead of a slip being made out by the broker or the underwriter, the insurance companies make out in their own offices a document called a *cover note* or *insurance note*, containing a sketch of the insurance or a memorandum which is to serve as a first step in the drawing up of a proper document in the form of a policy. Of course, these documents contain incomplete information which can only be explained when read in connection with a regular policy of insurance. Unless these documents are properly stamped, they would not constitute a contract.

### Policy of Insurance

A policy of insurance may be either (1) a *valued policy*, i.e. a policy which specifies the agreed value of the subject-matter insured, or (2) an *open policy*, which does not specify the value of the subject-matter insured, which has, therefore, to be ascertained subsequently at the time the claim arises, or (3) a *time policy*, which covers the risk up to a stated amount for a fixed time, or (4) a *floating policy*, which describes the insurance in general terms and leaves the name of the ship or ships or other particulars to be defined by subsequent disclosure.

With regard to the policy of insurance, it must be noted that (1) it should not exceed the period of twelve months so far as time is concerned, (2) it must specify the particular risk or adventure for which it is taken out, and (3) it must also bear the name of the underwriter and the sum insured.

### The "Lloyds" form of Policy

The form of marine insurance policy, as adopted by all British insurance companies with little variation, is the one known as the "Lloyds policy" which has been in use among the underwriters at the "Lloyds" for a great length of time. Of course, the actual form supplied by the Corporation of Lloyds to its "underwriting members" has a distinctive mark which cannot be used by non-members.

The following is the form of the policy known as the Lloyds' policy :—

#### BE IT KNOWN THAT (1)

as well in ( ) own name, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all, doth make assurance, and cause (2) ( ) and they and every of them to be insured, (3) lost or not lost, at and from (4) ( ), (5) upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel, (6) called the ( ) whereof ( ), is master, under God, for this present voyage, or whosoever else shall go for master in the said ship or by whatsoever other name or names the said ship or the master thereof is or shall be named and called (7) Beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship ( ); upon the said ship, etc. ( ), and so shall continue and endure, during her abode there, upon the said ship, etc., and further until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever, shall be arrived at ( ), upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed.

(8) And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to, and touch, and stay at any ports or places whatsoever ( ) without prejudice, to this insurance,

(9) *THE* said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at ( ).

(10) Touching the adventures and perils which we, the assurers, are contented to bear and to take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainerments of all kings, princes and peoples of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, etc., or any part thereof.

(11) *AND* in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel, for, in, and about the defence, safeguards and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof, we the assurers will contribute, each one according to the rate and quantity of this sum herein assured.

(12) *AND* it is especially declared and agreed, that no acts of the insurer or insured in recovering, saving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

(13) *AND* it is agreed by us, the insurers, that this writing or policy of insurance, shall be of as much force and effect as the surest writing or policy of insurance heretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London.

(14) *AND* so, we, the assurers, are contented and do hereby promise, and bind ourselves each one for his own part, our heirs, executors and goods, to the assured, their heirs, executors, administrators or assigns, for the true performance of the promises.

(15) *CONFESSING* ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of ( ).

(16) ( [blank for inserting rate of premium] ).

(17) In witness whereof we, the assurers, have subscribed our names and sums assured in London

(18) *N.B.*—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5 pounds per cent; and all other goods, also the ship and freight, are warranted free from average under 3 pounds per cent, unless general, or the ship be stranded

(19) £ (sum in figures) A B (sum in words) day of A.D.  
 £ ( do. ) C D ( do. ) do.  
 £ ( do. ) E F ( do. ) do.

(and so on, until the aggregate amount of the different sums subscribed by each underwriter equals the amount required to be insured).

### The Principal Clauses

From the above form it will be noticed that the policy of marine insurance is made up of various clauses dealing with the following particulars which may be dealt with in detail separately. The main headings are as following:—

- (1) Name or names of parties for whom insurance is effected.
- (2) Lost or not-lost clause.



- (3) Description of the voyage or duration of the risk.
- (4) Name of the ship and master.
- (5) Liberty to touch and stay.
- (6) Valuation clause.
- (7) Clause enumerating the perils insured against.
- (8) Sue and labour clause.
- (9) Waiver clause.
- (10) Acknowledgment of receipt of premium and rate charged.
- (11) Memorandum ; and
- (12) Signatures of the underwriters and risk undertaken by each.

### (1) The Parties

With regard to this, it may be noted that all persons competent to contract may be parties to a policy of insurance. A policy may be underwritten or undertaken by either an insurance company or an individual underwriter as is the case on the "Lloyds" in England.

The expression, "for and in the name of all and every other person or persons, etc.", protects all persons who had insurable interest at the time of effecting the policy or who acquired insurable interest during the continuation of the risk.

### (2) Lost or Not-lost

This clause protects the insured, who, in good faith, insured goods which were on a ship which has left a foreign port, in case the ship were destroyed unknown to him, before he effected the policy. According to Arnold on *Marine Insurance*, "the clause, however, though never omitted, does not appear to be, in all cases, strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an insurance subsequently effected, if at the time the assured was ignorant of the loss or he and the underwriter were equally cognizant thereof." However, all English policies contain this clause nowadays and most of the American, German, Dutch, French and Portuguese policies embrace more or less similar clauses. We have seen that, in this case, both the insured as well as the insurer ought not to have been aware of the loss of the goods or the steamer at the time of the insurance, because if the insured knew of the loss and did not inform the insurer at the time of effecting insurance the policy would be void. On the same principle, if at the time of effecting the policy, the underwriter or the insurance company knew that the steamer had safely completed her voyage, and that, therefore, no risk as far as sea was concerned was involved, he would not be entitled to claim the premium.

### (3) Description of the Voyage or Duration of the Risk

This clause begins with the words "at and from" and in the blank left in the policy is inserted the description of the voyage intended

to be insured. The risk begins from the place at which the steamer is at the time of insurance and ends when she arrives at the port of destination. Of course, taking for granted that if the steamer has not started on a voyage, she shall do so within a reasonable time unless an express provision to the contrary is made. To this clause, words are generally added to the effect, "including all risk of craft to and from the vessel" with a view to cover all the risk during the course of the goods being loaded or unloaded. Some policies even include a more extensive clause known as the "warehouse clause" which covers, besides the risk dealt with above, all risks "including risk from the warehouse of the consignor by any conveyance by land or by water, and until safely delivered into the warehouse of the consignees or their agents."

#### (4) Name of the Ship and Master

Here is given the name of the ship and the master for the voyage which is insured by it.

#### (5) Liberty to Touch and Stay and "Deviation"

This clause runs as follows:-

"And it shall be lawful for the said ship, etc., in this voyage, to proceed, sail and to touch and stay at any ports, or places, whatsoever, without prejudice to this insurance."

The gap left in this clause has to be filled in with the names of the particular ports the steamer is at liberty to touch. This is done, because according to law it is the duty of the insured not to deviate, i.e. go out of the proper course which steamers generally take while proceeding on a voyage between any two given seaports unless deviation is caused through one of the causes which are excused, or unless the policy expressly provides for such a deviation. In the absence of an express clause, it is always implied that the ship shall not deviate. Deviation is defined in *Arnold on Marine Insurance* as "any unexcused or unexcused departure from the usual course or general mode of carrying on the voyage insured, by which the risk is altered though the original *terminus ad quem* of the voyage insured is still kept in view. It is not necessary of course to show that the risk, if any, was being enhanced by such deviation. It is also held that if the voyage is not commenced and completed within a reasonable time that may also be construed as a deviation. In short, "any unreasonable and unexcused delay either in commencing or prosecuting the voyage insured, no less absolves the underwriter from the liability to subsequent loss than a local departure from the usual course of navigation." In the following circumstances deviation would be excused:-

- (1) if specifically provided for by the policy
- (2) if necessitated either by moral or physical force
- (3) through unavoidable necessity

- (4) to save human life
- (5) to obtain medical assistance for any person on board
- (6) to avoid capture and seizure by the King's enemies, pirates, etc.
- (7) by stress of weather.

It may happen that the captain may be compelled by mutiny of sailors or by stress of weather to deviate from its course, in which case the deviation would undoubtedly be excused.

### (6) Valuation Clause

The valuation clause either states the actual value of the goods as agreed upon between the underwriter and the insured in case of a valued policy, or as in the case of an open policy a blank is left after the words, "and shall be valued at \_\_\_\_\_". In the latter case, it would mean that the valuation is to be made at the time the claim arises in case of loss which value has to be proved by the insured. In the former case, however, the valuation as agreed upon between the parties and as inserted in the blank is conclusive between the parties. [*Barker v. Janson*, (1868) L.R. 3 C.P. 303]. If, however, there is an overvaluation on the part of the insured which overvaluation was made with a view to defraud the underwriters the policy would be voidable. [*Haug v. De La Cour*, (1812) 3 Camp. 319.] This rule as to valuation would apply whether the loss be total or partial. According to Lord Ellenborough in *Forbes v. Aspinall*, (1811) 13 East 327, the valuation of goods may not only include the first cost of the goods *plus* expenses, premium and commission, but all probable profits, whereas, in an open policy, his Lordship laid down that nothing more can be recovered by the insured in case of goods than the invoice price *plus* expenses. In case of freight, the actual freight which the ship would earn with premium thereupon paid by the insured, would be recoverable.

### (7) Sea Perils Insured Against or the Perils of the Sea

These perils include in detail all the perils against which the insured is protected. This clause in the "Lloyds" embraces almost all the sea perils including "perils of the seas, men-of-war, fire, pirates, rovers, thieves, jettisons, arrests, restraints and detentions of kings, princes and people, barratry of masters and mariners and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods or merchandise and the ship."

The wording of this clause, as given above, gives us an idea of the wide range of sea perils which are covered by the usual policy of the "Lloyds". It may be noted, however, that the term "perils" means any fortuitous accidents and not the ordinary action of wind and waves, nor does it include what may be described as wear and tear. There must be some casualty—something unforeseen. Of course, foundering at sea, shipwreck and losses caused by sea, and damage by

violence of the elements would be embraced by the term "perils of the sea". Loss by fire is recoverable under this clause which includes fire as one of the risks insured against. It would thus be seen that were it not for the express provision in the "Lloyds" policy covering a wide range of risks given under various headings, "perils of the sea", as understood at law, would afford very little protection to the insured. In case of leakage and breakage the underwriters are liable only when such leakage is caused by violent action of the elements and will not cover leakage which must be expected to occur on an average ship. On the other hand, the perils of the sea also include losses through collision with another vessel, or through the ship striking a rock or other obstruction, whether in fair weather or in stormy weather, and they also include incursion of sea-water through a hole in a pipe gnawed by rats.

#### (8) Sue and Labour Clause

Under this clause it is specially provided that it shall be lawful to the assured, his factors, agents and assigns, to do all in their power to defend the property insured in case of damage or loss and in return the underwriter agrees that the insured's rights to his insurance claim are not in any way prejudiced; and that all the expenses thought lawful in such attainment shall, save costs against the damage insured, be made good by the underwriter. According to Lord Blackburn [*Aitchison v. Lohre*, (1879) 4 C.P.D. 371]:

"The object of the clause was to encourage exertion on the part of the assured not to provide an additional remedy for the recovery by the assured of indemnity for a loss which was, by the maritime law, a consequence of the peril."

It may be added here, that the recovery of expenditure considered to have been reasonably incurred, can be claimed. It may, however, be added that the expenses incurred ought to be those incurred in respect of the risk to goods which were in peril, and these ought to be perils against which they had to be incurred in order to defend the goods against such perils. Expenses incurred with the object of averting the occurrence of a peril would not be covered by this clause. Besides this, the expenses should have been incurred only by the assured, his servants, factors or assigns, and will not include those incurred by other parties who do not fall under this description, e.g. salvors picking up property voluntarily.

#### (9) Waiver Clause

The waiver clause is in fact a continuation of the "sue and labour" clause because it lays down in fact that "no acts of the assurer or assured in recovering, serving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment". This clause is, nowadays found in almost all policies of the "Lloyds".

## (10) Receipt of Premium and the Rate Charged

The receipt of premium and the rate charged are stated in this clause. Premium is consideration paid by the insured to the underwriters for undertaking to indemnify him against the loss as per the terms of the policy. The form of Lloyds' policy clearly uses the words "confessing ourselves paid the consideration due" as if the premium had already been paid to the underwriter at the time the policy was effected. In practice, however, the premium in London on the "Lloyds" is not paid by the broker at the time of effecting the policy. The practice there is to pass the amount in account between the insurance broker and the underwriter. In India also, unless the insurance is effected directly with a company, the broker generally settles with the company and recovers the premium from his client. Anyhow, as far as the underwriter is concerned, his acknowledgment of the receipt of premium binds him and he is prevented from attempting to recover the same from the insured on the ground that the broker had failed. The broker, however, gets a lien on the policy for the advance that he may have made by way of payment of the premium on account of the insured. The lien will, of course, be lost if the broker delivers the policy to the insured or to any one else at his order. We have already seen that the premium forms part of the insurable value. The premium can only be retained by the underwriter in cases where the risk has begun to run, otherwise the premium has to be returned. If, however, an entire risk had not been incurred, but it did commence and continued up to a certain stage, the premium is not returnable and even a proportionate return of premium cannot be demanded; e.g., if the policy taken out be on "at and from" terms, and the risk has commenced, no proportionate return of the premium can be paid even though the vessel may have been lost at the port while taking the cargo. Also in a case where the policy is avoided on the ground of unjustifiable deviation, the insured is not entitled to claim a return of the premium. If, however, the policy is rendered void by the underwriter, the premium must be returned. Where the policy is rendered void *ab initio* through the insured not having complied with one of the warranties express or implied, he would be entitled to claim the return of premium. With regard to open policies where a premium is paid in excess of the risk covered by the actual value of the goods, the excess is returnable but the same rule will not apply where in a valued policy the property is over-valued. In fact, in case of the total failure of consideration such as where the ship at the commencement of the risk is unseaworthy, or where it did not sail at all, or where the whole venture is abandoned by the insured, the premium can be recovered. Whereas, if the policy has once been attached, the premium becomes irrecoverable.

## MEMORANDUM

The commodities which are the subject-matter of marine insurance comprise various articles which are liable to undergo deterioration or damage to a greater or lesser extent according to their peculiar nature. Some of these commodities may even perish or be damaged through detention or delay. To avoid, therefore, claims arising through the inherent vice in the nature of such commodities, almost every policy of insurance includes a clause or memorandum as in the case of the Lloyds' policy called the "F. P. A." clause. Under the F. P. A. clause, or the memorandum, the underwriter is liable for total loss but is not liable for particular average or partial loss. Partial loss is agreed to be paid if it exceeds  $\frac{1}{2}$  in certain cases and  $5\%$  in others. The clause in the Lloyds' policy, as given on a previous page, lays down that in the case of commodities such as corn, fish, salt, fruit, flour and seed which are of a very perishable nature, the underwriter would be liable for general average loss or where the ship is stranded. In the case of the other set of commodities of a less perishable nature such as sugar, tobacco, hemp, flax, hides and skins, the underwriter would be liable only to pay particular average or partial loss where the loss comes to over  $5\%$  of the value. On the other hand, where the loss is caused through general average, or through the ship being stranded, the underwriter would be liable to pay the whole of such loss. However, if the loss in both these cases of  $\frac{1}{2}$  and  $5\%$  of the prime cost or insured value amounts to the agreed percentage, the underwriter agrees to pay the full loss. It may also be noted in connection with the memorandum that it has been held that the word "corn" does not include rice but includes malt, peas and beans, and that the word salt does not include saltpetre. The calculation of percentage, in case of  $5\%$ , is not to be made on the whole amount of risk but on each article enumerated separately. In the case of the  $\frac{1}{2}$  clause, however, the percentage is to be calculated on the aggregate value unless the articles are separately valued in the policy. The word "stranded" as used in the Memorandum, means actually getting fixed for some space of time. Again, the stranding of a ship exclusively means stranding of that particular ship and will not include the stranding of a lighter in which the goods are being conveyed from or to the ship. In one case where a ship ran aground on some piles placed in a river-bed in full view from the shore and was left there, it was held to be stranding within the meaning of the Memorandum. In short, what is aimed at by the stranding is not a mere touch and go but the actual settling down in a quiescent state.

## REINSURANCE

An underwriter or an insurance company may, when the risk is considered too great, get a part reinsured with another underwriter or

insurance company. This reinsurance does not affect the position of the original insured, for the original insurance remains a distinct contract by itself and the reinsurance in its turn forms equally a distinct contract between the second set of parties. The original insured, therefore, has no claim on the reinsurance contract but can only claim from his own underwriter. To take an illustration, supposing A gets his ship insured with B for Rs. 10,000 for a certain premium. Now, if B, the underwriter, wishes to reinsure half the risk, he may reinsure with C for, say, Rs. 5,000. In case of loss, A can only put in a claim against B, but he has no right against C. B has to pay his claim and in his turn claim half the loss from C. If, therefore, B were to fail and A's claim is not paid, A cannot claim the reinsured amount from the underwriter C with whom the insurance was effected. C is liable to pay in such an event only to B's trustee in bankruptcy.

Arnold in his work on *Marine Insurance* defines reinsurance as—

“a contract by which, in consideration of a certain premium, the original insurer throws upon another the risk for which he has made himself responsible to the original assured, to whom, however, he alone remains liable on the original insurance.”

It has also been laid down that the original underwriter need not give a notice of abandonment to the reinsurer. The doctrine of subrogation applies equally to a reinsurance of the original insurance. It may be added that the insured may also have his risk insured against the insolvency of the underwriter with whom he has effected an insurance, in case events happen which cast some doubt in his mind as to the ultimate solvency of that person.

## DOUBLE INSURANCE

Double insurance is quite distinct from reinsurance. Here, the insured effects more than one insurance. If he does so without any fraudulent intent, he can recover on all the policies. If the total amount of all the policies taken together comes to more than the actual value of the subject-matter insured, the insured can only recover the actual value. He can recover the full value on the original policies till his total loss is made up. If, for example, a merchant not knowing the actual value of his goods, insures them for an approximate amount, and then thinking that amount is not sufficient to cover the risk, effects a second insurance, he can do so. Now, when the loss occurs, he may recover as much of it as he can, from the first policy, and if that does not satisfy his claim, he may proceed to recover the balance on the other policy. The underwriters may, thereafter, adjust their contribution among themselves.

The above rule applies when one party with the same interest insures it by effecting more than one policy. It often happens that two or more parties, with distinct interests in the same property, insure the property separately on their own account, each up to its full value.

In such a case each would be entitled to recover the full amount of his claim based on separate interests.

Lord Mansfield, while dealing with this rule of contribution, in case of *over-insurance* laid down as follows :—

"In case of *over-insurance*, the different sets of policies are considered as making but one insurance, and are good to the extent of the value of the effects put in risk ; the assured can recover on the different policies no more than their value, but he may sue the underwriters on any of the policies, and recover from those, he so sues, to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a rateable sum by way of contribution from the underwriters of the other policy." [*Newby v. Reid*, (1783) 1 W. Bl. 428.]

Hence, where a merchant, the value of whose whole interest was £22,001, first effected a policy on this interest at Liverpool for £17,001, and then without fraud another policy on the same interest at London for £22,001, he was allowed to recover the whole amount on the London policy, and the London underwriters were allowed to recover a rateable amount by way of contribution from the Liverpool underwriters. (*Roger v. Davis* and *Davis v. Gildart*, (1696) 2 Park, Ins. 601 2).

## LOSSES

The losses of insurance may be either (1) *partial*, or (2) *total* ; and the total losses are again sub-divided into (a) *actual total loss*, and (b) *constructive total loss*. The various incidents of partial losses were considered while dealing with the expression "perils of the sea". A *partial loss* arises where the subject-matter insured is damaged only partially, or where it is not damaged at all but a contribution by way of general average is reserved, about which we shall see later.

### Actual Total Loss

With regard to total losses an *actual total loss* arises when the thing is (1) wholly destroyed or annihilated by any of the risks against which it was insured, as when a thing is broken to pieces and no longer answers the original description, or is burnt to ashes, or goes down to the bottom of the sea ; or (2) is through the same risk lost to the assured absolutely or irrevocably, so that it is beyond the powers of the insured party to recover it, as where in one case a ship ran on an island and was wrecked and the goods thereon were plundered by savages who lived there, it was declared to be an actual total loss.

### Constructive Total Loss

This loss arises when the thing insured though not wholly destroyed is reduced to such a state, or is placed in such a position, that to get it repaired would be most expensive and no prudent business man would care to do so, or its ultimate safety would be most doubtful.



This may arise, when a ship has run on a rock and is stranded there badly damaged and to send out steamers to save and bring it back and repair it would involve an expense greater than the actual value of the steamer, or when the risk involved is so great that no prudent business man would care to undertake the adventure. Cases of a constructive loss total may be multiplied. The other instance is where a ship is captured by the enemy and though the same may not be confiscated, the probabilities are that it may never return safe. In *Macheth & Co. v. Maritime Insurance Co.*, (1808) A.C. 144, it has been laid down that the insured is entitled to add the cost of repairs to the value of the ship in determining the amount claimable. According to Arnold on *Marine Insurance*,

"there is a case of constructive total loss, where the subject-matter though not totally destroyed, its destruction is rendered highly probable, and its recovery, though not utterly hopeless, yet exceedingly doubtful."

### Abandonment

When there is a case of constructive total loss, the insured can abandon the property and must in that case give notice to the underwriters, called "notice of abandonment", thereby rescinding all his rights to the recovery of the property and claiming an indemnity as for a total loss. Thus, if any part of the property is recovered or saved thereafter, the underwriter who has paid as for a total loss gets it as a salvage to which he is entitled. It may be added here, that the "notice of abandonment" must be absolute and not conditional as the insured must, in order to obtain his indemnity, absolutely transfer his ownership. If it answers these requirements, it may be either oral or written, and no special form is necessary. The doctrine of abandonment is laid down at length in the judgment of Lord Abinger, in *Roux v. Salvador*, (1836) 3 Bing N.C. 266:—

"The underwriter," said His Lordship, "engages that the subject of insurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured."

"But there are intermediate cases: there may be a capture which though *prima facie* a total loss, may be followed by a recapture, which would revert the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship innavigable, without any hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination."

"In all these or any other similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the under-

writer treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it still exists and is vested in him, the very principle of indemnity requires that he should make a cession of all his rights to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist in specie but there is a possibility, however remote, of its arriving at its port of destination or, at least, of its value being in some way affected by the measure that may be adopted for the recovery or preservation of it.

"If the assured prefers the chance of any advantage that may result to him beyond the value of the thing insured, he is at liberty to do so; but he must also abide the risk of the arrival of the thing in such a state as to entitle him to no more than a partial loss. If, in case the loss should become absolute, the underwriter is not the less liable upon his contract because the assured has used his own exertions to preserve the thing insured, or has postponed his claim, till that event of a total loss has become certain, which was uncertain before."

The principle on which the rule as to notice of abandonment is governed is that if the article insured exists in specie, and there is a chance of recovery, notice of abandonment must be given; but the mere fact that it exists in specie at the time of loss does not render it necessary to give notice of abandonment, particularly where there is not the slightest chance of recovering that which is lost.

### SUBROGATION

The doctrine of subrogation applies equally to marine insurance and fire insurance, as well as to all contracts of indemnity generally. It lays down the principle which is quite equitable, viz that in cases of contracts of insurance such as marine and fire insurance, where a loss occurs, and the underwriters pay as for a total loss, they, the underwriters, step into the shoes of the insured with regard to all the rights and remedies that the insured may have had against the third party and with regard to any benefit arising therefrom. To take an illustration, supposing that a ship called *India* was insured for £5,000 and it was lost through collision with another ship called *Egypt*. If the underwriters paid the owners of *India* an indemnity of £5,000 as per the policy, they acquire a right as per this doctrine of subrogation to sue the owner of the *Egypt* for damages in case the collision was due to the fault of the master of the *Egypt*. They can bring this action in the name of the owner of the *India* and if they succeed in obtaining judgment in their favour they are solely entitled to the amount awarded by the court.

Lord Blackburn, in *Burnand v. Romaranchi*, (1882) 7 App. Cas. 323, said that—

"the general rule of law (and it is obvious justice) is that, where there is a contract of indemnity (it matters not whether it is a marine

policy or policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes the amount which the indemnifier is bound to pay, and, if the indemnifier has already paid it, then, if anything which diminishes the loss, comes into the hand of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

The difference between abandonment and subrogation lies principally in that, in case of abandonment there must be a total loss, whereas in case of subrogation, whether the loss is total or partial, in fact, however small, it would apply, and the party to a contract of indemnity who is called upon to pay, has the right to claim to be reimbursed. Again, it has been laid down that the underwriter cannot get any further advantage or better advantage than the insured is entitled to, because all he is entitled to, is to stand in the shoes of the insured. Again, it has been laid down that the underwriter would be entitled to be subrogated in place of the insured only on the payment of the whole loss sustained, whether total or partial. Of course, it is quite open to the parties to a contract of marine insurance to include a special provision in the policy excluding the right of subrogation in which case such an inclusion would be binding on the parties concerned.

#### "Causa proxima" or the Proximate Cause

There is a well-known maxim of marine insurance which runs as follows: '*Causa proxima non remota spectatur*', which means that in deciding whether the loss has arisen through any of the risks insured against, the proximate or the nearest cause ought to be considered. It often happens that a succession of causes have operated to bring about a particular damage and the difficulty arises when a number of these causes are not insured against, whereas the others are. In such cases the rule is to see what the proximate or the nearest cause of damage is, and if that is insured against, the underwriter must pay. To take an illustration, in one case the goods were insured against damage by sea-water. Some rats on board bore a hole in a zinc pipe in the bath which caused sea-water to pour out and damage the goods. The underwriters contended that as they had not insured against the damage by rats, they were not bound to pay. It was, however, decided that the proximate cause of damage being sea-water, the insured was entitled to damages, the rats being a remote cause. It may be added that the same maxim applies in the case of fire insurance.

#### Insurable Freight

Freight is only earned by the shipowner when the ship reaches its destination safely. This rule of law may be modified by any agreement to the contrary between the parties. Generally, in case of a charter-party, where the whole or a large portion of the ship is

chartered or hired, a part of the freight is paid in advance and the other part is agreed to be paid on completion of the contract. Here the shipowner can insure that part of the freight which he is likely to lose in case the ship is destroyed through some accident or does not reach its destination safe. The charterer may insure his advance against the risk as he stands to lose it if the ship is lost. Of course, much would depend on the clause as to the payment of freight in arriving at the actual extent of the insurable interest of either of the parties.

It may also be noticed here, that the word "freight" in its ordinary commercial parlance means the amount paid for the hiring of a ship for a particular time or voyage, or the compensation for taking goods from one place to another, as in the case of a general ship. In marine insurance law, freight also means the benefit that the shipowner expects to derive by way of profits on his own goods which he carries side by side with the goods of others.

### **Assignment of Policy of Marine Insurance**

An assignment of a policy of marine insurance may be made either by a writing endorsed on the policy or by merely delivering the policy with the intention to assign. No particular form for assignment by endorsement is necessary. When the goods are shipped to countries over the sea and policies are taken out, these policies are generally assigned by the original insured in favour of the person to whom he sells the goods or to the agent to whom the goods are shipped. The only conditions necessary are that (1) at the time of assignment the assignor had an insurable interest in the subject-matter insured, and (2) that the risk was at the time a continuing risk. If it turns out that the assignment was made after the subject-matter insured was lost or damaged, it means that the assignor has transferred his own right as to the damage to the assignee. Of course, if there is a clause in the marine insurance policy expressly prohibiting assignment, it cannot be assigned.

### **AVERAGE**

The losses in marine insurance are also divided into two special divisions known as (1) Particular Average Loss, and (2) General Average Loss. Arnold defines particular average loss as follows:—

"A particular average loss is a loss arising from damage accidentally and proximately caused, by the perils insured against, to some particular interest, as the ship alone or the cargo alone."

It would thus be seen that the particular average loss is a loss sustained through the perils insured against, not for the general safety of the ship, but through a mere accident, which would have to be borne by the owner of the goods if they were not insured against. The basis on which the loss would be calculated is arrived at by taking into consideration the value of the goods, the actual damage

caused, and the actual amount for which these goods were insured. In other words, if the goods were fully insured, the actual value of the goods would be the basis of the particular average claim. The value of the goods is to be either the buying cost, to which all the expenses of putting them on board are added, or as in the case of the valued policy, the actual value agreed upon by the parties. The fluctuations of the market value will not, therefore, affect the amount of damages payable in case of particular average.

### General Average

The general average loss stands on quite a different footing from the particular average. In case of general average, the loss arises from a **voluntary sacrifice** by the captain of a part of the cargo, or some part of the furniture of the ship itself, or some extraordinary expenditure incurred by way of repairs, etc., to enable the ship to proceed safely with her journey. If, for example, the ship on its voyage meets with a heavy storm and is drifting towards rocks, or is leaking, and the captain thinks, after due deliberation that a part of the cargo must be sacrificed by being thrown overboard, that the mast and the ship's cable ought to be cut and thrown overboard, and that the ship's cable ought to be touched to effect urgent repairs, consequent to the damage suffered by his ship, or where assistance of some other ship is taken to tow it to a port of safety, to the owner of which salvage has to be paid, all these losses and the extraordinary expenses voluntarily incurred would make up the total of the general average loss. Now, as this general average loss is voluntarily incurred in order to save the ship and the balance of the cargo, all the persons interested in this voyage must each contribute towards this loss rateably. If, for example, a ship has on board the goods of A, B, C and D and the captain has to sacrifice all the goods of A and half of those of B and has also to break and throw overboard the mast, it would be inequitable to allow C and D, to receive their goods without contribution. The loss incurred in this case by A and B, as well as by the shipowner, was for the general safety, and therefore all the parties interested, viz. A, B, C, D and the shipowner, respectively, should bear their relative proportion of the loss.

The peculiarity of this general average loss is, that it is a **voluntary sacrifice**. If, for example, the mast was not particularly thrown overboard but was washed off by the storm, it would be a particular average, and the loss would fall on the shipowner to whom it belonged. Another peculiarity is, that it is a **sacrifice for the general safety**. As in one case, where a mob boarded a ship laden with corn and wanted to purchase the corn at a certain low price, refusing to return till that was done, it was decided that the loss was not a general average loss because neither the rest of the cargo nor the ship was in danger as the mob wanted only the corn.

Where the goods are insured and the insurance covers this general average loss, the underwriter indemnifies the insured for this loss, i.e. pays him the general average contribution which the cargo-owner has to pay on account of the general average loss.

It should be noticed here that the incident of general average *vires* rise to two facts, viz. (1) the loss by way of general average is incurred through voluntary sacrifice of the goods or ship or part of it; and (2) the general average contribution is paid by the persons interested in the venture for whom the general average loss was incurred. One learned judge puts down general average loss as "a loss arising out of extraordinary sacrifice made, or extraordinary expenses incurred, for the preservation of ship and cargo." It should also be noted that what is aimed at is, that the sacrifice should be voluntary, i.e. through an act of men and not through accident; that it should have been incurred for general safety, and that if it was not for general safety, or that the general safety was not imperilled, there would be no case for general average contribution. Besides that, it has been laid down that the sacrifice must have been incurred under circumstances of real pressure and peril. It is also laid down that the general average expenditure, or sacrifice, ought to be of an extraordinary nature which means that, it must not be of the nature which is usual in connection with an ordinary voyage, but something which the shipowner is not bound to do; and in one case, where the engines of a steamship were damaged through being worked ahead and astern, in order to get a ship off a bank where it had struck, it was considered an extraordinary loss.

## CHAPTER XV

### COMMON CARRIERS AND CARRIAGE OF GOODS BY LAND, AIR & SEA

**CARRIERS** include those who carry goods and passengers by land, air or sea. Generally speaking the duties and liabilities of carriers in India are governed by the Common law of England, except where modified by (the Indian Carriers Act of 1865 and Carriers (Amendment) Act of 1921. (In case of railways the Indian Railways Act of 1890 governs the position.) In the case of carriage by air the Indian Aircraft Act of 1934 deals with that question.)

(Carriers are divided under two main headings, i.e. (1) Private Carriers and (2) Common Carriers.

#### Private Carriers

Private Carriers are those who occasionally carry goods for others and that too under special agreement, whereas Common Carriers are prepared to carry goods or passengers for all who choose to employ them and receive as their reward or hire a sum of money.

#### Common Carriers

The Common Carriers thus must take goods offered to them for carriage and cannot refuse to do so unless there is a lawful excuse for refusing them. These carriers hold out, expressly or by conduct, that they are prepared to carry for hire as long as they have room for goods or passengers to stations and places declared by the carriers as their common routes for such carriage. Thus a Common Carrier cannot pick and choose the persons for whom he will act as a carrier for goods or passengers. Whereas Private Carriers are liable for any loss or destruction of the goods through their negligence, the responsibility of Common Carriers is greater as the law implies that they, so to say, guarantee or ensure the safety of the goods they carry, unless the loss was occasioned by what is called an "Act of God" or by "the King's enemies", or loss arising through the inherent or latent defects in the goods themselves, which would include deterioration in the case of perishable goods, as well as loss due to indifferent packing. The liability of a Common Carrier, as already stated falls under (1) the Common law of England and (2) the provisions of the Carriers Acts mentioned above. In fact, the Carriers Acts modify to a certain extent their liabilities and rights.

#### His Liabilities and Duties

The liability of a Common Carrier begins as soon as he expressly or by implication accepts goods for carriage. These goods he is bound

to carry safely and deliver in the same safe condition within a reasonable time at its destination. If perishable goods get spoiled on the way and the carrier believes that he will not be able to deliver them in good condition, he has the power to sell them. This sale is known as "Sale by Necessity", and before the sale is made as far as possible the carrier is expected to obtain instructions from the owner of the goods. The same rule applies to Common Carriers by Sea as we shall see later. We have also seen that he must deliver the goods within a reasonable time and if there is an unreasonable delay he may have to pay damages. Here, however, the carrier is within his rights to make an agreement with the owner of the goods as to time for delivery and may even exclude his liability for damage done by delay by a special agreement. The carrier is also expected to take the customary route which may not necessarily be the shortest route. The "warranty of non-deviation" which applies to shipping also applies to Common Carriers by land and it is expected that there shall not be any unnecessary delay by a Common Carrier either by land or sea as that deviation may deprive the carrier of the exemption from liability he has obtained through a special agreement. After the goods have been brought to their destination but before they are taken delivery of by the owner or the party to whom they are sent, the carrier has to warehouse them, the carrier's responsibility as a carrier ceases and the only responsibility which now continues is that of a common bailee under the Indian Contract Act.)

### **The Indian Carriers Acts, 1865 & 1921**

The Indian Carriers Acts referred to above were passed to relieve Common Carriers in India from some of the extraordinary liabilities which the Common law of England imposed on them, particularly in case of goods delivered to them which were of exceptional value or of a perishable nature which have been declared to be valuable or perishable. Thus it is laid down by the Act of 1865 that where a consignment which exceeds Rs. 100 in value and is of the description mentioned in the Schedule annexed to the Act, is offered for carriage without declaration of its value, the carrier shall not be liable for loss or damage to such an article. If, however, the value is declared, the carrier is entitled to charge an extra freight or reward, but will be liable for loss or damage. The Schedule to the Act mentions articles such as gold, silver, precious stones, jewellery, time-pieces, currency notes, Government securities, maps, title-deeds, articles of ivory, ebony, or sandalwood, opium, colour materials, musical and scientific instruments, glass, china, jade, amber, hemp, rubber, feathers, etc. The Governor-in-Council is authorised to add to the list other articles at his discretion. When the damage occurs the owner of the goods who has declared the goods and paid extra freight is entitled to recover this extra or additional payment, as well as the damages he has sustained



because of the loss of the goods. However, where the value has been declared by the owner his claim cannot exceed that value, whereas the carrier is empowered by the Acts to challenge the valuation at the time of loss and insist upon proper proof. Owing to some conflicting decisions of the Bombay and Calcutta High Courts and the judgment of the Judicial Committee of the Privy Council in *Irawaddi Flotilla & Co. v. Buguanda*, 18 C. 620, P.C., the Carriers (Amendment) Act of 1921 was passed in order to amend section 8 of Carriers Act of 1865. In the Carriers Act of 1865 under Section 8 it was laid down that in cases of negligence the carrier was liable in any event for any article which was lost or damaged. This section made the law laid down in Section 3 to a great degree nugatory viz. that scheduled articles of value or those of a perishable nature, if valued at more than Rs. 100 must be declared and the extra rate paid. The Amending Act of 1921 removed that position and now the rule is that whether the loss or damage is due to negligence or not the carrier is not liable, unless the value of the article has been declared in accordance with the requirements of Section 3. The other defect in the Carriers Act of 1865 was remedied by the addition of Section 10 in 1899, providing that the claimant for damage or loss must notify his claim to the carrier within six months of the date when the claimant first knew of the injury. The carrier is also liable under the Act of 1865 for loss or damage due to any criminal act of the carrier himself, his servant or agent and for unlawful acts or misfeasance, viz. converting the goods to his own use, or knowingly delivering same to a wrong person.

### (Carriage by Railway or Railways as Common Carriers

In the case of railway companies the liability is controlled by Sections 72 to 82 of the Indian Railways Act, 1890.) The English Common law or the Indian Carriers Act do not apply to them. (The reason given being that most of the railways in India were to a large extent in the hands of the Government and the Government was exempt from the original definition of the Carriers Act of 1865 of a Common Carrier. The railways are also allowed to enter into agreements by which they may limit or extend their liability for carriage of goods, as is generally done by "Risk Notes") with which we have already dealt in former chapters dealing with the liability of a bailee under the Indian Contract Act.

{Sections 72 to 78 are as follows:—

72. (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the Common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

73. (1) The responsibility of a railway administration under the last foregoing section for the loss, destruction or deterioration of animals delivered to the administration, to be carried on a railway shall not in any case exceed, in the case of elephants or horses, five hundred rupees a head or, in the case of (mules), camels or horned cattle, fifty rupees a head or, in the case of (donkeys), sheep, goats, dogs or other animals, ten rupees a head, unless the person sending or delivering them to the administration caused them to be declared or declared them, at the time of their delivery for carriage by railway, to be respectively of higher value than five hundred, fifty or ten rupees a head, as the case may be.

(2) Where such higher value has been declared, the railway administration may charge, in respect of the increased risk, a percentage upon the excess of the value so declared over the respective sums aforesaid.

(3) In every proceeding against a railway administration or deterioration of any animal, the burden of proving the value of the animal, and, where the animal has been injured, the extent of the injury, shall lie upon the person claiming the compensation.

74. A railway administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor.

75. (1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has been deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorised in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein.

76. In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be neces-

may for the plaintiff to prove how the loss, destruction or deterioration was caused.

77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animal or goods for carriage by railway.

78. Notwithstanding anything in the foregoing provisions of this Chapter, a railway administration shall not be responsible for the loss, destruction or deterioration of any goods with respect to the description of which an account materially false has been delivered under subsection (1) of the section 58 if the loss, destruction or deterioration is in any way brought about by the false account, nor in any case for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account.

### **Carriage by Air**

The law of carriage by air is still in its very early stages and all that we have done in India is to adopt the Warsaw Convention of 1929, which applies to carriage by air between independent international stations and regulates carriage by air of passengers, their luggage and goods. The Acts applicable to British India are the provisions of the Warsaw Convention dealing with the rights and liabilities of carriers of passengers etc., irrespective of nationality, and they may also be applied to internal carriage by air by notification by the Governor-General.

### **Carriage of Passengers by Air**

In the case of passengers a carrier has to deliver a ticket containing particulars as to the place and date of issue, places of departure and of destination, agreed stopping places (with a reservation to alter them in case of necessity), the name and address of the carrier, and a statement that the carriage is subject to rules relating to liability contained in the schedule.

In the case of luggage also a ticket has to be given containing almost similar particulars as in the case of passengers but also stating the number of the passenger's ticket, the number and weight of the packages, and the amount of the value declared. It further provides that the absence, irregularity or loss of the luggage coupon does not affect the existence or the validity of the contract of carriage. However the carrier has to state particulars as required by the Act on the ticket, otherwise he is not entitled to avail himself of the provisions of the Act which exclude or limit his liability.

### **Carriage of Goods by Air**

In the case of goods the carrier has a right to require the consignor to make out and hand over to him a document called an "air consignment note", which the consignor has a right to require

the carrier to accept. The absence, irregularity or loss of this consignment note will not affect the validity of the contract of carriage. The consignment note is to be made out in three original parts and handed over, along with the goods, to the carrier, the first part being marked "for the carrier" and signed by the consignor, the second marked "for the consignee" and signed by both the consignor and the carrier, and the third which will be signed by the carrier and returned to the consignor against the goods he accepts. Where there are more packages than one, separate consignment notes may be demanded by the carrier. The consignment note contains the place and date of execution, places of departure and destination, names and addresses of the consignor, carrier and consignee, and the nature of the goods. The number of packages must also be stated in addition to the mode of packing, the weight as well as quantity and value, their condition, the freight agreed to be paid and the place of payment and the rules relating to liability. If the goods are not C.O.D. (cash on delivery), the price of the goods, the value declared, if any, the time for completion of carriage and the route to be followed in brief and a statement that the carriage is subject to the rules regarding liability contained in the Schedule to the Act. The carrier will not be entitled to avail himself of the provisions of the Schedule to the Act of limiting or excluding his liability, if he accepts the goods without a consignment note. The consignor is responsible to give particulars of the goods and in case the carrier suffers any loss or damage through the irregularity or inaccuracy of the statement the consignor will be liable to compensate him accordingly. The carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In the same way he is liable for loss or damage of the registered goods. This is, however, subject to the condition that if the carrier can prove that he and his agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures, the carrier may not be liable, in a case of accident to passengers, whereas in regard to luggage also the carrier is not liable if he can prove that the damage was occasioned by negligent piloting or negligence in the handling of the aircraft or in navigation and that, in all other respects he and his agents had taken all necessary measures to avoid the damage. Liability in the case of passengers is limited to 125,000 francs. In case of registered luggage and of goods the liability of the carrier is limited to 250 francs per kilogram, unless, as we have seen above, the consignor has declared the value of the package and paid or agreed to pay extra freight. Where the carriage is partly on land and partly by air the rules will only apply as far as carriage by air is concerned.

## SHIPPING AND CARRIAGE BY SEA

A contract for the carriage of goods by sea is to be found either in the form of a charter-party, or as in the case of a general ship, it is embodied in a bill of lading. "Ship" includes every description of vessel used in navigation not propelled by oars, and "vessel" includes any ship or boat or any other description of a vessel used in navigation.

These contracts for the carriage of goods over the sea are known as "contracts of affreightment". The consideration paid for carrying of these goods is known as the "freight".

### Who may Own a British Ship

Any British subject or corporation may become the owner of a British ship by the transfer of such a ship, or by acquiring a share in such a ship or by building such a ship himself. This ownership of the ship has to be registered in order to secure the privileges of being British. All British ships above a certain tonnage are compelled to carry certified officers and the required number of seamen. In the case of steamers carrying a certain number of men, a doctor is also compulsory. These ships are also required to carry compasses properly adjusted and passed by the surveyor of the Board of Trade; also proper life saving appliances, etc.

### Chartered or General Ship

When a merchant wishes to send goods over the sea to some other part of the world, he hires a whole steamer or part of it, or he ships his goods on what is known as a *general ship*, i.e. a ship belonging to another person or company, which declares its intention to go on a particular voyage of its own accord, and offers to carry goods belonging to others to any of the places at which the steamer is to call. In either of these cases the consideration paid to the owner of the ship for this service or hire is known as freight.

### Shipping Agreements of Hire

When the whole of a ship, or a large portion of it, is hired for a voyage, or for a period, a formal agreement is drawn out embracing clauses stating the various conditions of the contract. This agreement is called the *charter-party*. The form of the charter-party depends on the agreement between the parties to it, the custom of the particular ports involved, and the nature of the adventure. The charter-party may operate as a *demise*, in which case the ship entirely passes under the control of the hirer who becomes the virtual owner for the time being, and the officers and crew in such cases take their orders from him (the hirer), or, as is more usually the case, it may form an agreement under which the use of the ship is temporarily given over for a particular purpose, both the ownership and the control of

the officers and crew remaining with the shipowner. Much, of course, would depend on the nature of the agreement contemplated by the charter-party.

(When the goods are delivered on board, a document called the *bill of lading* signed by the owner of the ship is given to the shipper, in which the owner acknowledges receipt of these goods. Where a charter-party is drawn out the bill of lading forms a simple acknowledgment of the receipt of the goods on board and refers to the conditions in the charter-party under which the goods are received. In a general ship, there is no charter-party, as here the voyage is undertaken on the owner's account, a large number of merchants shipping their goods to be carried to the ports at which the steamer is to call in the course of its voyage. Thus in a general ship, the shipowner acts as a common carrier, carrying goods, for all who desire to send them, to the ports declared by him and there the bill of lading, besides forming an acknowledgment of the safe receipt of the goods, contains various conditions and stipulations making up the contract. The practice in this case is that the shipper, on delivering his goods on board, receives from the captain a provisional receipt for the goods known as the "Mate's Receipt", which is exchanged by him for the regular bill of lading at the office of the shipping company concerned.

It should be noted that in both cases, viz. where the charter-party is made out and where it is not, the bill of lading is indispensable. The only difference being that, in the first case, where the charter-party is made out, the bill of lading is a simple acknowledgment of the goods received on board, whereas, in the second case, the clauses and conditions regarding the contract of carriage are printed on the instrument. These two documents make up the *contract of affreightment*.

### Charter-party

The term charter-party is supposed to be a corruption of the Latin word *charta partita*.

It is an agreement by which a shipowner agrees to hold his ship or part of it at the disposal of the shipper so that the shipper's goods may be conveyed to the agreed port of destination, the money consideration paid by the shipper to the shipowner for this, being called the freight.

The *charter-party* has to be stamped. The actual form or wording of a charter-party is not settled by law, and the forms of charter-parties differ in the matter of detail according to the custom of the ports where they are made out and also according to the nature of the voyage or enterprise, but the main and important clauses of these contracts of affreightment are now almost uniform in all charter-parties by the custom of the shipping trade. We shall, therefore, proceed to examine the peculiarities of the most important clauses of the

**charter-party.** These clauses generally relate to the following:—(1) The parties, (2) the term of the voyage, (3) condition that the ship is seaworthy, (4) prosecution of the voyage, (5) master to obey charterer, (6) time lost by breakdown, (7) freight payment, (8) cargo, (9) penalty, (10) excepted perils and negligence clause, and (11) lay days.

### The Parties

The first clause of the charter-party deals with the name and description of the parties and the name and the description of the steamer. The next clause deals with the term for which the ship is hired when it is hired for a fixed time; or the voyage, in case it is engaged for a particular voyage.

### Condition of the Ship or "Seaworthiness"

This clause, in a charter-party, usually runs as follows:—

"That at the date of the commencement of the voyage, the ship shall be *tight, staunch and strong*, and in every way fitted for the voyage, and shall be manned with a full complement of officers and crew, and ready to take cargo."

Under our Indian Mercantile Shipping Act, Sec. 4, **unseaworthiness** is defined as:—

A ship is **unseaworthy** within the meaning of this charter when the material of which she is made, her construction, the qualifications of the master, the number and description of the crew, the weight, description and storage of cargo, the tackle, sails, rigging, stores, ballast and other equipment generally are not such as to render her in every respect fit for the proposed voyage for service.

Under this clause the shipowner expressly guarantees to the hirer that his ship would be "**seaworthy**" at the commencement of the voyage. Seaworthy, in simple language, means **reasonably fit to undertake the service for which she is meant and to face the perils and accidents of a voyage which she would have to face on the voyage in contemplation.** In other words, she must not be in leaky state or with sails in a rotten condition, or with an insufficient supply of coal to last on the voyage, etc. She must also be under the command of a qualified officer and must carry an adequate number of sailors or seamen. A ship's seaworthiness may also be affected by the bad method employed in stowing cargo, which might lay it open to the risk of capsizing. This seaworthiness must not only exist at the time the ship sets out on its voyage, but if that voyage be divided in stages, at the commencement of every stage the ship must be in a seaworthy condition, e.g., if a ship is leaving Bombay for London, it must not only be seaworthy at the time she sails from Bombay, but when she reaches Aden, and after touching the port wishes to start for the next stage, say, Port Said, she must also be in a seaworthy condition at the

moment of time she leaves Aden, and so on. When, therefore, the hirer goes to insure his cargo with an insurance company or underwriter he is protected by this guarantee because, as explained in the Chapter on Marine Insurance, one of the implied warranties in marine insurance is that the ship on which goods are carried, will be or was seaworthy at the commencement of the voyage. This warranty from the shipowner, to provide a seaworthy ship, is absolute, and he must make all honest endeavour to comply with it. A breach of this warranty would lay the shipowner open to an action for damages suffered through unseaworthiness.

### **Prosecution of the Voyage**

There is also a clause to be found in charter-parties stating that the voyage shall be prosecuted "with all convenient speed", i.e. with all reasonable despatch as soon as the necessary clearance has been obtained, and the clearance itself ought to be obtained without undue delay as per the terms in the charter-party. It may be mentioned in this connection that before a ship is allowed to start on a voyage, it has to obtain a clearance certificate. This is generally obtained by the shipowner, unless as per the charter party the charterer has agreed to do so. The master of the ship, therefore, under the usual circumstances, obtains this certificate, which must be obtained without unreasonable delay, otherwise the shipowner would be responsible for loss caused through the delay.

This clause should clearly define the voyage, specifying the port of loading and the port of discharge. The steamer has to take the usual course of navigation followed by other steamers and must not deviate, except in cases where deviation is excused, as indicated in the Chapter on Marine Insurance.

### **Master to Obey the Charterer and Delay through Breakdown**

The next clause states as to how far the captain has to take his orders from the hirer and the clause as to breakdown generally lays down that in cases where there is delay through the breakdown of machinery or deficiency of crew, or other damage to the ship, for twenty-four hours, the hire would cease till the ship is again put in a fit condition.

### **Freight Payment**

Freight is the consideration agreed to be paid by the cargo-owner to the shipowner for hiring the ship, or a portion of it, for carrying of the goods between certain ports. A separate clause in the charter-party lays down the agreement with regard to it. This is a very important clause as it lays down when and how and to whom the freight is payable. Generally speaking, the freight is taken to be due on completion of the voyage when the goods are ready for delivery. If



a part of the goods are lost during the voyage, the freight on that part would not be payable. In every charter-party, however, special stipulations as to freight are inserted. If the stipulation lays down specifically that the freight is payable in advance, then if the ship commenced its voyage and was lost thereafter, no part of the freight paid in advance is returnable. The advance freight falls due at the moment the ship commences its voyage, and if not paid it can be recovered by the shipowner even in case of the loss of the ship. Besides, the freight may be payable per ton, per package, or in a lump sum. If the hirer does not give a full cargo as agreed, he would have to make good the damage known as the *dead freight*.

An extra percentage is frequently arranged to be paid over and above the agreed freight known as the *hat money* or *primage*. This formerly went to the master as a consideration for extra care to be taken on the goods. In strict law, it is the master's remuneration which he can recover from the shipowner. The practice now is that the shipowners, at the time of engaging a master's services, take an agreement from him in which the latter agrees to forego his primage in consideration of the payment of a regular salary. In some charter-parties it is expressly stipulated that in case of the loss of the ship, only a certain portion of the agreed freight would be payable. This clause would then hold good.

It must also be noted here that the shipowner has a lien in law on the goods he carries for the freight due on them and, therefore, he can refuse to deliver the cargo till the freight due is paid. In a case of advance freight, however, or in a case of dead freight, or demurrage, there is no lien in law and special clauses are generally inserted in the charter-parties to enable the shipowner to acquire such a lien. Such a clause is called the "*lien clause*" of the charter-party. In the absence of such a clause it has been held that it is the cargo which is liable to pay the freight by the general law, and therefore the merchants who have shipped their goods on chartered ships are not responsible for any more freight than that covered by their own goods. In the case of *Paul v. Birch* (1743), 2 Alk. 621, Paul hired his ship to one Birch at £48 per month. Birch took cargo of different merchants at £9 a ton for carriage. Birch then turned bankrupt. Paul sued the merchants to pay him the full hire due. It was decided that he could recover no more than what the merchants had engaged to pay for their respective goods. His Lordship said—

"A person who lets out a ship to hire, ought to take care that the hirer is a substantial man, it is his business to look to this; and if the persons who hire are not competent, the master must suffer for his neglect. Whatever hardship, therefore, there may be on the one hand to the person who lets out to hire, the hardship is much greater on the other side; and what gives additional weight to the merchant's case is the great convenience this gives to trade in general."

**There is no Common law lien for freight payable in advance.**

### Cargo, Etc.

Clauses are also to be found in a charter-party to the effect that the charterer should ship lawful merchandise, and mentioning those who are to pay the working expenses of the ship. The usual practice is to actually state the nature of the cargo to be shipped. This may be stated in a general form such as "cotton, seed and wheat". The cargo has to be as near to the description as the circumstances of each case would permit. Of course, in the case of a general ship such a specific description of the cargo is not possible and the words "lawful merchandise" are generally used. As per Section 32 of the Indian Mercantile Shipping Act,

"No cargo of which more than one-third consists of any kind of grain, corn, rice, paddy, pulse, seed, nuts or nut-kernels (hereinafter called the cargo) shall be carried on board any British Indian ship unless the same be contained in bags, sacks or barrels, or secured from shifting by board or bulkheads or otherwise."

Any neglect of this condition by an owner or master of a ship is made penal. It may, however, be added that in the case of a chartered ship where the clause in the charter-party expressly states the nature of the cargo, no other cargo which does not answer that description can be loaded without the consent of the shipowner, as the shipowner is only bound to carry the cargo specified in the charter. The charter-party also states the quantity which the shipowner undertakes to carry.

A special clause is frequently inserted stating the amount of penalty, if any, for the non-performance of the agreement.

### Excepted Perils and Negligence Clause

All charter-parties contain a clause by which the shipowner exempts himself from liability arising from a particular set of perils, viz.:—(1) *Act of God*. This means some unforeseen peril or accident which is not the result of any human agency and which no human agency could have reasonably foreseen or prevented; e.g. ship struck down by lightning, etc. (2) *King's enemies, restraint of princes, rulers and people*. "Enemies" here mean foreign enemies of the king and not traitors. "Restraint" here means embargo, blockades, etc., levied by any lawful authority which interrupt the voyage and may include seizure of the ship, or cargo, by our own Government, or even by friendly states not at war with us. It may happen that on the outbreak of war between two states friendly to us, an embargo is declared by one or both of them of each other's ports and it would be useless to send a ship to such a port. (3) *Perils of the sea*. These mean ordinary accidents and dangers of a sea voyage which are not brought about by negligence of the captain, such as collisions, heavy storm bringing seawater in the ship, etc. (4) *Barratry of master and crew, pirates, etc.* In former days when no regular postal or telegraph service existed, and when the world was not properly mapped, the master

and crew often resorted to frauds of various types such as selling the goods, abandoning the ship and absconding, etc. In fact 'barratry' means in law all frauds knowingly committed by the captain with the intention of benefiting himself at the expense of his owners; and where the master deliberately violated his duty to his employer. A mere negligence or inadvertence would not fall under this heading. Pirates, too, have disappeared nowadays except on the coast of China, but robbery by them on the sea is generally treated in charter-parties as an exempted peril. This term is also held now to include rioters who attack the ship at shore. It may be added here, that the charterer can and does always protect himself against these risks, by taking out a marine insurance policy with proper stipulations as discussed in the Chapter on Marine Insurance.

Of course, at Common law, the shipowner is not liable for any loss or damage arising through the act of God, or through any act on the part of the King's enemies or through any inherent defects in the goods. In spite of this, the charter-party contains stipulations excluding the liability of shipowners on those grounds. We have also considered at some length the meaning of the expression "perils of the sea" in the Chapter on Marine Insurance, and thus need not deal with this point further. The exact wording of the clause as appearing in the charter-parties generally is as follows:—

"The act of God, the King's enemies, restraint of princes and rulers, fire and all and every dangers and accidents of the seas, rivers and navigations of what nature and kind soever, throughout the voyage being excepted."

### Negligence

This clause provides for loss occasioned through accidents such as collisions, stranding, breakdown in boilers and machinery, even though such accidents are caused through the negligence, default, or error of the captain or officers, or servants of the shipowners. The shipowner is specially exempted from liability through the operation of this clause, unless it is due to want of due diligence on the part of the shipowner, or the captain, or caused while attempting to render salvage services.

The negligence clause will not exclude the implied condition as to seaworthiness of the steamer at the commencement of the voyage.

### Lay Days

Charter-parties generally lay down the number of days allowed for the loading and unloading of cargo. If the word 'days' is mentioned without any qualification, it is doubtful whether working days would be construed to be meant at all harbours. As per the acknowledged custom on the river Thames, "days" have been held to mean "working days". In all other cases it would be the safest course to

use the expression "working days" in the charter-party. If the charter-party is entirely silent on this point, a reasonable time for loading or unloading of the steamer would be taken as implied. What is a reasonable time would depend on the circumstances existing at the time of the performance of the obligation. According to Lord Chief Justice Cockburn,

"The question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the regulations and course of business at the port." [*Ford v. Cotesworth*, (1870) L.R. 4, Q.B. 127-30.]

The expression "custom of the port" as used in charter-parties should not be taken to mean "custom" as understood by lawyers, but means a settled and established practice of the port. [*Postlethwaite v. Freeland*, (1886) 5 App. Cas. 599-616.]

The expression '*with usual despatch*' means the despatch of those who have the cargo ready on the dock for the purpose of loading.

### Demurrage

If a claim in the form of damage suffered by shipowners through the improper detention of the ship by the merchant is made, it falls under the heading of **demurrage**. This claim arises from a clause generally inserted in a charter-party or in a bill of lading. In the latter case it is to be found in the form of a marginal clause. A person claiming and receiving the goods under the bill of lading is answerable for this payment. The rule laid down in this connection by Lord Tenterden is recognized as fixed law on this point, viz.:

"Where the time is expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part; for he has engaged that it shall be done."

The "lay days" commence to run from the moment of time the charterer has had notice of the ship's arrival and readiness to take or discharge cargo. "Days" may be "running" or "working". If they are not expressed to be "working days" they are to be taken to mean "running days" unless the custom of a particular port gives some other meaning to those expressions as in the case of the Thames river custom dealt with above. It has also been held that the charterer cannot set off time saved at the port of discharge against demurrage incurred at the port of loading. The charter-party usually states the number of "lay days" allowed for loading and unloading the cargo and also lays down the sum per day payable in case of delay exceeding the "lay days" allowed. If the "lay days" are named but the charge for demurrage is not specifically stated, the shipowner can, notwithstanding, claim damages for the delay.

## BILLS OF LADING

We have seen that a bill of lading is an indispensable complement of the charter-party where one is drawn out, but in the absence of a charter-party the bill of lading, besides forming an acknowledgment of the shipment of goods, also embraces the agreement of carriage. When it is signed by the master, as is usually the case, he does so as the agent of the shipowner. In the case of a general ship, charter-parties are not drawn out and the agreement of carriage is printed on the bill of lading itself, the conditions and terms of which correspond with those we have dealt with above in the case of charter-parties. There are a few peculiarities, however, with which we shall now deal. A bill of lading is held to be a good evidence of a contract of carriage in the case of a general ship.

As to the goods delivered, the captain may state either "delivered in good order and condition" or "weight, contents and value unknown". In the former case the captain is bound to deliver the goods in the same good condition as they were at the time of loading, the usual depreciation on the voyage being excepted; the document in such cases would be known as a "clean" bill of lading.

The peculiarity of a bill of lading is that it is a document of title to the goods and in case the goods are made deliverable to the "bearer" or to a particular person or to his "order" or "assigns", the bill of lading can be transferred by the original holder to anyone he chooses, and the transferee in his turn can also transfer it. This transfer can be made by endorsement or delivery, as the case may be, and the transferee acquires, by such a transfer, all the rights as to the goods shipped that the transferor had and is also subject to the same liabilities as that of the transferor. If, therefore, a bill of lading is transferred by the shipper to some other person, whether such a person is the buyer, or his mercantile agent lawfully entrusted with the bill of lading, and if that person, during the course of the transit of the goods, endorses the same in favour of some other person, who purchases the goods in good faith and for valuable consideration, the right of stoppage in transit of the original holder cannot be exercised against this last party.

A bill of lading is frequently described as a negotiable instrument though it is not one in the strict sense of the term. There are undoubtedly many points of resemblance between a bill of lading and a negotiable instrument, e.g. its transferability by delivery with or without endorsement and without any notice to the person liable on it, and also that the transferee of a bill of lading can sue in his own name and give a valid discharge to the person liable. Thus, some authors have called it a *quasi-negotiable* document. It differs from a bill of exchange on the point of negotiability, because in the case of a bill of lading, a holder cannot give a better title than he himself has,

whereas in case of a bill of exchange a holder in due course, who receives the bill for value and in good faith, receives it free from all defences as to defect in title as could have been successfully pleaded against a previous holder, except, of course, forgery.

The bill of lading is generally made out in a set of two or three. Sometimes happens that these get into the hands of two or three different parties. In such cases the first transferee gets the best right at law. As far as the master is concerned, if he *bona fide* hands over the goods to any one of these holders, he is free from responsibility and incurs no liability to the person who happens to claim a prior right, because the bills of lading provide for this contingency by a clause usually inserted in them, laying down that as soon as one of these documents is accomplished the others stand void.

The ground on which this is done is well explained by Earl Selborne :—

It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor or date, are given as to the same goods, it is provided that 'the one of these bills being accomplished, the others are to stand void.' It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment of which the shipowner has no notice, should prevent a *bona fide* delivery under one of the bills of lading, produced to him by the person named on the face of it, as entitled to delivery in the absence of assignment from being a discharge to the shipowner.

### Charter-party different from a Bill of Lading

If the terms in a charter-party differ from those in a bill of lading issued by the charter those in the charter-party would prevail, unless it has been expressly agreed to substitute the contract contained in the bill of lading for the contract in the charter-party.

### General Ship

A contract for conveyance of merchandise of a general ship is defined in *Abbot on Shipping* as follows :—

A contract "by which the masters and owners of a ship destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination. This contract although usually made personally with the master, and not with the owners, is considered in law to be made with them also, and that both he and they are separately bound to the performance of it."

"It would be noticed here that the captain is also personally responsible for the performance of the contract. The captain, no doubt, acts and signs such contracts on behalf of his masters who are the principals, but the reason why he is made personally responsible is that, 'the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a twofold remedy against the one or the other.'"

—*Abbot on Shipping*.

The bill of lading was defined by Mr. Justice Shee as :—

"The written acknowledgment of the master that he has received the goods from the shipper to be conveyed, on the terms therein expressed, to their destination, and there delivered to the parties by him designated. The master, therefore, should be careful not to sign bills of lading, until the goods are actually delivered to him, or to permit the insertion of statements in the bill of lading at variance with the fact."—*Abbot on Shipping*.

We have seen that where a charter-party is not made out, the bill of lading contains the contract of carriage. Here, however, it should be added that unless the captain has received the goods there cannot be a contract in the case of a bill of lading ; because the captain, at law, has no authority to make a contract of carriage to bind the shipowner except in the case of the goods received by him to be carried. It may, however, be noted that many judges have treated bills of lading with printed terms and conditions of the contract of carriage as if they were independent contracts. Lord Bramwell, however, objects to this description. According to His Lordship, the statement in the English Bills of Lading Act, 1855, which refers to the contract as "the contract contained in the bill of lading" is erroneous, because His Lordship's idea seems to have been that there is no such contract contained in the instrument, and that all it presents is a receipt for the goods which also states "the terms on which they were delivered to, and received by, the ship and, therefore, forms excellent evidence of these terms, but it is not a contract. This has been made before the bill of lading was given."

According to Lord Esher,

"The terms of the Bill of Lading Act (English) show that the legislature looked upon a bill of lading as containing the terms of contract."

In short, the conclusion one can arrive at after going through the various decisions on this point, seems to be that whether a bill of lading is in itself a contract or not, it is undoubtedly a valid document evidencing the terms and conditions printed on it, and, therefore, serves the same purpose as a written contract would have done.

### Marked and Numbered

The shipper has to make and consecutively number all his packages. He has to select a distinctive mark by which his goods are to be distinguished from those of others, and these marks and numbers are to be stated on the margin of the bill of lading. There is also a clause in the bill of lading stating that if any of these marks are obliterated and in consequence thereof the goods were to go astray, the shipowner would not be responsible for the loss.

### **Loss by Prolongation of Voyage**

It happens that a voyage for various reasons takes more time than usual, in which case goods of a perishable nature get damaged or spoiled. A special clause in bills of lading always exempts the shipowner from such a risk.

### **Salvage**

It often happens that the ship or its cargo may have to take the assistance of some other ship in case of accidents, breakdown, etc. The owner of the ship which renders this assistance is entitled to be remunerated for his trouble. Such remuneration is called "salvage". This salvage would have to be borne by the cargo-owner if the assistance was rendered with a view to save the cargo. If, both the ship and cargo were assisted, the shipowner as well as the cargo-owner should contribute. In case all or any of these were insured, the insurance company or the underwriters would make good the loss.

The salver can claim his salvage only in those cases where assistance has proved to be beneficial, in which case he also acquires a lien for his salvage on the property saved.

### **"Through" Bill of Lading**

The goods on some occasions have to be carried partly across the sea and partly by land, and the shipowner generally charges a rate which covers the charge both for the transit by sea and land. In such cases he issues what is called a "through" bill of lading.

### **The Master of the Ship**

The master of a ship represents the ship-owner as his agent for various purposes. He signs the bills of lading as the owner's agent except where the ship is chartered and the charterer puts up the ship as a general ship, when the master may sign the bill of lading as the charterer's agent. His duties include the care of the ship entrusted to his charge, navigating it in proper manner and starting on the voyage as per instructions. He is empowered to do all that is usual and necessary in the usual course of the employment of the ship. He must deliver the cargo at its destination in proper condition and to the proper party. When he needs money for the necessary purposes of the voyage, he may raise it by hypothecation if he cannot communicate with the owner or procure money by any other means. He can deviate from his ordinary course when he thinks deviation necessary in order to save the ship from peril. If he cannot proceed on the voyage for good reasons he has also the power to tranship the goods to some other steamer. He may also, when absolutely necessary, enter into a salvage agreement on behalf of the shipowner as well as the cargo-owner.



He can make contracts and give warranties in the course of his usual employment which would be binding on the owner, though the master himself is personally liable on such contracts and the party can sue both of them.

### Bottomry Bond

When the master is in urgent need of money which he cannot raise on the owner's credit, or is unable to communicate with the owner, he has the power to give a bond known as the "bottomry bond" by which he pledges the ship as a security to the person advancing money. The peculiarity of this bond is that the capital and interest on the loan is payable only if the ship reaches its destination. If, therefore, after this bond is given, the master proceeds with the voyage and has, at some other port, to raise further money for urgent repairs for which he gives a second "bottomry bond" to some other person, this second person acquires a prior right over that of the lender on the first bond. If, however, after setting out on a voyage the same cannot be completed, or has to be abandoned, either owing to any act of the master, or through some impossibility which the bond holder cannot control, the bond becomes due and payable. Where the ship is totally lost, the bond becomes void; but if a part of it is saved the amount of the bond can be recovered therefrom.

### "Respondentia"

When money is borrowed on the security of the cargo the bond is known as *respondentia*. In this case also, the captain must in the first instance try to communicate with the cargo-owner, and this money should have been borrowed exclusively for the benefit of the cargo.

In extreme cases, specially where the goods are damaged, the master may sell them; but here too he must, wherever possible, obtain the consent of the cargo-owner. Where the master cannot raise the necessary money to enable him to proceed with the voyage, either on the credit of the shipowner, or on his own credit, or is unable to communicate with the owner, he may sell a part of the cargo in order to be able to carry the rest to its destination. The master can "jettison" or throw overboard a part of the cargo in order to save the rest. The cargo-owners, in such cases, are generally entitled to an average contribution. The master must keep official records and is also responsible for any fraudulent conduct on his own part when such conduct affects the interest of the owners.

### Master's Right of Transhipment or Sale

In cases where the master finds that by reason of the damage done to the ship he cannot proceed with the voyage without much loss of time, he has the liberty to secure another ship to carry the cargo.

Where the cargo is of a perishable nature and consequently transshipment cannot be effected, and if there is no time to consult the cargo-owner, the captain can sell the goods at the best available price. This power should be exercised with due caution and only as a last resort.

### **Master's Duty to Take Care of the Goods**

According to Mr. Justice Wills,

"It is a duty imposed upon the master, as representing the ship-owner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest the loss, destruction, or deterioration, or by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability."

## CHAPTER XVI

### INSOLVENCY LAW

THE INDIAN insolvency law is covered by two Acts, viz. (1) the Presidency Towns Insolvency Act of 1909, and (2) the Provincial Insolvency Act of 1920. Prior to these Acts the bankruptcy law of India was covered by a statute of Imperial legislation (*Act 11 and 12, Vic. Ch 21*). That Act has now been superseded by these two Acts of the Governor-General of India in Council. The effect of the enactment by the Governor-General in Council in place of the old Imperial Act is that the new Act cannot operate outside the limits of India and, therefore, the proceedings against an insolvent possessed of estates both in England and India must be conducted in both these countries. The Indian Acts cannot vest in the official assignee the real and personal estates of the insolvent, situate outside the limits of India, although they happen to lie within His Majesty's dominions.

#### PRESIDENCY TOWNS INSOLVENCY ACT

##### Who can be made an insolvent

Before answering this question, it may be noted that the word 'bankrupt' means in England, a person who has committed an act of bankruptcy and who has been adjudicated a bankrupt, whereas an insolvent in English law means a person who is unable to pay his debts, i.e. whose liabilities exceed his assets. In our Indian Act the word 'insolvent' is used throughout, as if it were synonymous with the word 'bankrupt'. It is so used because the word 'insolvent' has become quite familiar in Indian law and practice.

Any person of full age and sound mind may be declared an insolvent under the circumstances dealt with later. An *infant* cannot be made a bankrupt unless the debt on which the bankruptcy is founded was incurred for necessities or is a judgment debt, but considerable doubt is expressed on this point, and different authors have expressed different views on the subject.

A *married woman* may be made a bankrupt in connection with her contract binding her separate estates, because marriage does not disqualify either a Hindu, Mahomedan, Parsi or European wife from entering into a contract.

It is also decided that a *lunatic* may be adjudicated a bankrupt with the consent of the Court of Lunacy under the direction of the committee.

With regard to a *foreigner*, if he is trading within the jurisdiction of this Act and has been domiciled here, he can be made a bankrupt

position can be entertained or whether the debtor should be adjudged a bankrupt. Here, as we have seen, the adjudication order is passed on the petition from the very beginning. The court may also reject the petition if it is not satisfied with the proofs furnished by the creditors as to the acts of insolvency or as to the debt due to the petitioning creditors. The petition will also be rejected if the debtor appears and satisfies the court that he is able to pay his debts. If the debtor does not appear after the petition is served on him, the order of adjudication will be made as a matter of course. If, however, it happens that the debtor appears and disputes the claim of his petitioning creditor, or that the claim is less than the amount which would justify the petitioner in petitioning against him, the court may, on the deposit of security, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt. A creditor's petition shall not, after presentation, be withdrawn without the leave of the court (Sec. 13). It is, however, open to the court to appoint an *interim* receiver of the property of the debtor to take possession of it pending the petition and before an order of adjudication, on being satisfied that such an order was necessary for the protection of his claim (Sec. 16).

#### ✓ Effect of Adjudication Order

The effect of the order of adjudication is that all the property of the insolvent, wherever situated, vests in the official assignee in India and trustee in bankruptcy in England for the benefit of the creditors of the debtor. After such an order, no creditor of the insolvent can bring any suit without the leave of the court nor can he have any remedy against the property of the insolvent during the pendency of the insolvency, as long as the creditor's debt is provable in insolvency. This rule, however, does not prevent a subsequent creditor from realizing or otherwise dealing with his security (Sec. 17).

After passing the adjudication order, the court may stay any suit or other proceedings that may be pending against the insolvent before any Judge or Judges of the court, or in some other court subject to the superintendence of the court.

#### The Protection Order

A Protection Order is an order of the court by which the insolvent is protected from being arrested or detained in prison for any debt to which the order shall apply and in case the insolvent is already under arrest or detention he may be entitled to be released. The idea of this order is that the insolvent debtor should not be harassed by the execution creditors during the time that his affairs in insolvency are under investigation, provided the insolvent performs his duties as prescribed by the Act. The court may, at its discretion, make the protection order even before the insolvent has submitted his schedule, if it thinks

necessary to do so in the interests of the creditors (Sec. 25, P. T. I. Act, 1909).

### Special Manager

It frequently happens that the nature of the debtor's estate is such that in the interest of the creditors generally a special manager of the estate ought to be appointed to assist the official assignee. On being satisfied on this point, the court may make the appointment of a manager for any time it thinks fit, with powers to assist the official assignee in the work that may be assigned to him. A special manager would be required to furnish security, to keep accounts in such manner as may be directed by the court, and is to receive such remuneration as the court determines (Sec. 19)

### Protected Transactions

According to Section 57 of the Indian Presidency Towns Insolvency Act of 1909, and the corresponding Section 45 of the English Bankruptcy Act of 1914, if any of the following transactions take place before the date of the order of adjudication (in England the Receiving Order), and if the person, before such transactions take place, has not, at the time, notice of the presentation of any insolvency petition by or against the debtor, he will be protected. These transactions are (1) Any payment by an insolvent to any of his creditors, (2) any payment or delivery to the insolvent, (3) any transfers by the insolvent for valuable consideration, and (4) any contract or dealing by or with the insolvent for valuable consideration. Of course, in all these cases the payment or delivery, must be *bona fide*, in the ordinary course of business.

### Doctrine of Relation Back

In this connection it is important to note the material difference between the position at English law and that under our Presidency Towns Insolvency Act, Section 57. In English law, all transactions entered into with a bankrupt between the commencement of bankruptcy and the date of Receiving Order are protected, if the person receives no notice at the time of any available act of bankruptcy and if the transactions are *bona fide*, but those who have such a notice are prevented from entering into transactions with the bankrupt because if a petition is presented and the debtor adjudicated a bankrupt, within three months, the doctrine of "relation back" will make the dealings void against the trustee in bankruptcy. The doctrine of "relation back" lays down that in the case of a person adjudicated a bankrupt, all property belonging to him vests in the trustee in bankruptcy from the date of the commission of the first act of bankruptcy falling within a period of three months of the date of the commission of such an act. In Indian law, however, all transactions between the commence-

ment of the insolvency and the date of the order of adjudication are protected, if a person has no notice, or the presentation of the insolvency petition, and acts *bona fide*. In other words, the notice of the act of insolvency in India does not deprive the person dealing with the insolvent of the protection he enjoys, as it is in case of English law. [*Bhagvandas & Co. v. Chuttian Lal*, (1921) 43 All. 427; *Mercantile Bank of India, Ltd. v. Official Assignee, Madras*, (1916) 39 Mad. 250.]

## THE INSOLVENT'S SCHEDULE

The insolvent debtor is required to prepare a schedule within 30 days of the order of adjudication, if passed on the petition of the debtor himself, or within 30 days from the date of service of the order if made on the petition of a creditor. The schedule must be prepared in the prescribed form, given at the end of this Chapter, and if the debtor fails to prepare it he is liable to be committed to civil prison (Sec. 24). After the submission of the schedule the insolvent may apply to the court for protection and the court may then grant him a Protection Order on production of a certificate signed by the official assignee to the effect that he has so far conformed to the provisions of the Insolvency Act.

## Composition or Schemes of Arrangement

After an adjudication order is made, an insolvent may propose a scheme of composition, or submit a proposal for a scheme of arrangement which scheme shall be submitted by the Official Assignee to a meeting of creditors. A copy of the scheme or proposal is to be sent to each creditor mentioned in the schedule or to those who have tendered a proof of their claim before the meeting, and if on consideration of the debtor's proposal the majority in number and three-fourths in value of all the creditors resolve to accept the proposal, the scheme shall be taken to have been duly accepted by the creditors. Any creditor may accept or refuse to accept the scheme by a letter addressed to the official assignee to reach him before the day of the meeting, which act would be construed to be as good as his having attended and voted at the meeting. The Official Assignee should then apply to the court to approve the scheme, notifying all the creditors of the time and day on which such an application is to be made (Sec. 29). Any creditor who has proved his debt may oppose the scheme of composition even though he may have voted in favour of the proposition at the meeting. The court would hear the report of the official assignee as to the terms of the composition and conduct of the insolvent and then accept or approve the scheme in case it appears to the court reasonable and calculated to benefit the general body of the creditors, otherwise it would reject same. Where the court finds that certain circumstances have transpired which compel the court to refuse the insolvent's discharge, or to suspend or attach conditions to it, the

court will refuse to approve the proposal unless at least four annas in the rupee on all the unsecured debts against the debtor's estate are provided for by securities. On approving the scheme, the court would make an order annulling adjudication. On such an approval the composition scheme shall be binding on all creditors, so far as it relates to debts due to them from the insolvent which are provable in insolvency (Secs 29 & 30)

### **Annulment by Court**

The composition or scheme of arrangement may be annulled by the court under any of the following circumstances :—

- (1) Where any instalment due on the scheme is not paid ; or
- (2) where the court is of opinion that the scheme cannot proceed without injustice or undue delay ; or
- (3) if the court finds that its approval was obtained by fraud.

The effect of such an order is that the debtor is readjudged insolvent and his property once again vests in the official assignee, but, of course, without prejudice to the validity of any transfer or payment duly made in pursuance of the composition or the scheme. All debts provable in other respects which have been contracted before the date of such readjudication shall be provable in insolvency (Sec 31)

It may be added here that the approval of the composition scheme will not be binding on any creditor whose debt is of such a nature as would not be discharged by an order of discharge

### **Debts not wiped off by Discharge or Composition**

The following are the debts which do not discharge an insolvent either by an order of discharge or by the approval of the composition or scheme by the court—

- (a) Any debt due to the Crown ;
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the debtor was a party ;
- (c) any debt or liability in respect of which the debtor has obtained forbearance by any fraud to which he was a party ; or
- (d) any liability under an order for maintenance made under Section 488 of the Code of Criminal Procedure, 1898 (Sec 45)

### **Duties of the Insolvent**

The duties of the insolvent are clearly laid down in Section 33. They are as follows —

- (1) To attend any meeting of creditors which the official assignee may require him to attend, unless prevented by sickness or other sufficient cause and to give such information and submit to such examination as the meeting may require.
- (2) The insolvent shall—
  - (a) give such inventory of his property, such list of his

creditors and debtors and of the debts due to and from them, respectively ;

- (b) submit to such examination in respect of his property or his creditors ;
- (c) wait at such times and places on the official assignee or special manager ;
- (d) execute such powers-of-attorney, transfers and instruments ; and
- (e) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors

as may be required by the official assignee or special manager or may be prescribed or be directed by the court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested.

- (3) The insolvent shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.
- (4) If the insolvent wilfully fails to perform the duties imposed upon him by this section, or to deliver up possession to the official assignee of any part of his property, which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.

### DEBTOR'S PROPERTY

"Property," according to the Insolvency Act, "includes any property over which or over the profits of which any person has a disposing power which he may exercise for his own benefit" [Sec. 2(e)]. It shall not include any property possessed by the insolvent on trust for any other person or tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding three hundred rupees in the whole (Sec. 52). Where any part of the property of the insolvent consists of stock, shares in ships, shares or any other property transferable in the books of the company, the official assignee may exercise the right to transfer the property in the same manner as the insolvent may have done. Besides this, all the property of the insolvent which consists of things in action shall also be deemed to have been duly transferred to the official assignee. Also any banker, agent, or attorney of the insolvent or any other officer who may have any money or



securities in his possession belonging to the insolvent shall hand them over to the official assignee unless he has by law the power to retain them against the official assignee. If he fails to do so he shall be guilty of a contempt of court (Sec. 58). The Act also gives power to the court to grant a warrant for the searching of any building or room where any property belonging to the insolvent is supposed to be concealed.

With regard to an officer of the Army and Navy, or of His Majesty's Royal Indian Marine Service, or in the Civil Service of the Crown, the official receiver shall have the right to receive for distribution among creditors so much of the insolvent's pay or salary which is liable to attachment in execution of a decree as the court may direct (Secs. 59 & 60).

### Reputed Ownership

In this connection it should be noted that the doctrine of reputed ownership applies only to traders. It aims at the protection of the general creditors of a trader against their having given false credit through relying on the goods which are in the possession of the debtor and under his order and disposition, which do not belong to him in fact, but which ostensibly appear to be his property. [*Ryall v. Rowles*, (1750) 1 Ves. Sen., 348.] Thus, not only the goods actually belonging to the insolvent trader, but also those which happen to be under his "order and disposition" vest in the official assignee or trustee in bankruptcy. The requisites in case of reputed ownership happen to be that the property must be goods, that they must be in the possession, order or disposition of the insolvent, in his trade or business, and under such circumstance that he is a reputed owner. It is further necessary that the owner should have consented to such possession of the goods by the insolvent in his trade or business and that the possession should be such that he is the reputed owner thereof.

### After acquired Property

We have already seen above that the property acquired by the insolvent after adjudication also vests in the official assignee, but not unless and until this officer intervenes on behalf of the insolvent's estate. If he does not intervene and meanwhile the insolvent transfers his property to another who takes it in good faith and for value, the transferee acquires a good title to it. The same rule applies to the trustee in bankruptcy in England, under their Bankruptcy Act. Wages earned by the bankrupt after adjudication, by his own personal exertion or labour, also do not pass to the official assignee or trustee, i.e., at least such part of them, as are deemed necessary for the support of himself and his family. This rule is laid down in the English case of *Cohen v. Mitchell*, (1890) 25 Q.B.D., 262 on page 267. This case has been followed in India in *Chhote Lal v. Kadar Nath*, (1924) 46 All. 565. This rule applies to all after-acquired "chooses in action" such as legacy,

interest acquired after bankruptcy, in trust funds settled before bankruptcy as well as to after-acquired leaseholds. There is some conflict in opinion as to whether this rule in *Cohen v. Mitchell* applies to immovable property in India. The exact wording of the rule is as follows :—

“Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of his bankruptcy, are valid against the trustee.”

This rule applies to all transactions entered into with the bankrupt and not only to assignments or subsequent negotiations in trade made in favour of trade creditors. [*Ali Muhammad v. Vadulal*, (1919) 43 Bom. 890.]

### Debtor's Property in a Foreign State

Debtor's property in a Foreign State (which includes a Native State) is not included in the property which vests in the official assignee. Although the Presidency Towns Insolvency Act, 1909, talks of property of the insolvent “wherever situated” it does not include property situated outside British India. In other words, only property situated within British India will vest in the official assignee. In a recent Bombay case an insolvent had obtained discharge in Bombay. One of his creditors in Bombay filed a suit against the insolvent in a Foreign State where he had property. The insolvent applied to the Bombay court to restrain the creditor from doing so as the insolvent was discharged by the Bombay court with respect to all debts including the debt due to this particular creditor. The court refused on the ground that it had no jurisdiction to do so. [*Lakshmanam Keralam Bhatt v. Ponem bend Punnabai*, 22 Bom. L. R. 1173.]

### ONEROUS PROPERTY

Under this heading are placed shares and stocks in companies which are burdened with onerous conditions, unprofitable contracts, or any other property which is unsaleable or not readily saleable because of its binding the possessor to the performance of any onerous action or to the payment of any sum of money. In case of such property of the insolvent, the official assignee is given the option to disclaim and return it within twelve months after the adjudication of the insolvent. This power of disclaimer may be exercised by the official assignee notwithstanding the fact that he may have endeavoured to sell or may have taken possession of the property or may have exercised any act of ownership in relation thereto [Sec. 62(1)]. If, however, an application in writing has been made to the official assignee by any person interested in the property requiring him to decide whether he will disclaim, and the official assignee has declined or neglected to give notice that he disclaims within twenty-eight days after the receipt of application or such extended period as may be

allowed by the court, the official assignee shall not be entitled to disclaim the property thereafter and he shall be taken to have adopted it (Sec. 64). It is, however, laid down that in the case of leasehold property, the official assignee is not entitled to disclaim without the leave of the court. Before granting such leave the court may require such notices to be given to persons interested as it may think just (Secs. 62, 63 & 64). Any person injured by the operation of a disclaimer will be deemed to be a creditor of the insolvent to the extent of the amount of the injury, and may prove it as a debt under the insolvency (Sec. 67).

### Proof in Insolvency

On this question our Section 46 and Section 30 of the English Act of 1914 lay down that a creditor may prove all debts and liabilities, present or future, certain or contingent, to which the debtor is subject, when he is adjudged an insolvent, or to which he may become subject before discharge, by reason of any obligation incurred before the date of such adjudication. The only exceptions being (1) demands in the nature of unliquidated damages arising otherwise than by reason of a contract, or breach of trust, and (2) debt contracted with a person who had notice of the presentation of insolvency petition by or against the debtor. The debt shall be estimated by the official assignee, as to its provable value and in cases of debts the value of which is incapable of being fairly estimated in the opinion of the official assignee, he shall issue a certificate to that effect and thereupon the debt or liability shall be deemed to be a debt, not provable in insolvency. A creditor who fails to prove a debt or liability which is provable in insolvency cannot sue the insolvent after his discharge. Where a creditor had submitted his claim to the official assignee, but owing to an error in his office the final dividend was paid out without this creditor being paid, the court held that as this was a payment in mistake of fact the official receiver was entitled to a refund of the proportion belonging to this creditor from other creditors. (*J. Bala Devi v. The Official Assignee of Calcutta*, 54 Cal. 251.) Unliquidated damages which cannot be proved in insolvency are those arising from tort, such as libel, trespass, or misrepresentation in the prospectus. Of course, debts arising out of illegal or immoral consideration, gambling debts, etc. cannot be proved. Damages arising out of contract are provable in bankruptcy. [*Jack v. Kippling*, (1882) 2 Q.B.D. 113.]

### Proof by Different Types of Creditors

Where the payment of a debt is guaranteed and the principal debtor becomes insolvent, the creditor can prove for the full amount of the debt and then recover from the surety the amount of deficiency. The surety who has guaranteed a debt can also prove to the extent of his liability to indemnify for his contingent liability in the insolvency

of the principal debtor, although he has not paid anything to the creditor. [*Roderiques v. Ramaswamy Chettiar*, (1917) 40 Mad. 783.] The liability in respect of the winding up of a joint-stock company can also be proved in insolvency of the contributory. An executor who is also a creditor of the deceased has a right of retainer in English law by which he can retain the money due to him from the estate of the deceased insolvent of which he is the executor, but in Indian law he has no such right, and therefore he cannot prove in the insolvency of the deceased for the debt due to him (Indian Succession Act, 1925, Sec. 323). The holder of a bill of exchange has a similar right to prove in the insolvency of each of the prior parties to the bill and receive a dividend from each estate upon the whole debt, provided he does not get a larger amount than the one which is covered by the bill. [*Ex parte Rushforth*, (1805) 10 Ves. 409, p. 416.] The person who has endorsed a bill of exchange for the accommodation of another person is in the position of a surety and can prove in the insolvency of the person accommodated by him. [*Haig v. Jackson*, (1838) M. and W. 598.]

## REALIZATION OF THE DEBTOR'S PROPERTY

With regard to the realization of the debtor's property, Section 68 states as follows :—

(1) Subject to the provisions of this Act, the official assignee shall with all convenient speed, realize the property of the insolvent, and for that purpose may

(a) sell all or any part of the property of the insolvent ;

(b) give receipts for any money received by him ;  
and may, by leave of the court, do all or any of the following things, namely—

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;

(d) institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent ;

(e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the court ;

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, or debentures or debenture stock in any limited company subject to such stipulation as to security and otherwise as the court thinks fit ;

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business ;

(h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ;

(i) divide in its existing forms amongst the creditors according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

2. The official assignee shall account to the court and pay over moneys and deal with all securities in such manner as is prescribed or as the court directs.

### THE OFFICIAL ASSIGNEE

We have noticed what part the official assignee plays in the realization of the debtor's property. The official assignee is an officer appointed by the Chief Justice of each of the High Courts of Judicature at Fort William, Madras and Bombay, and the Chief Judge of the Chief Court of Lower Burma. He may be called upon to give such security and is subject to such rules as may be prescribed. He has a right to administer oath for the purpose of affidavits, verifying proofs, petitions or other proceedings under this Act and his duties shall have relation to the conduct of the insolvent as well as to the administration of his estate. In particular, it shall be the duty of the official assignee:—

(a) to investigate the conduct of the insolvent and to report to the court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under this Act or under Sections 421 to 424 of the Indian Penal Code, which would justify the court in refusing suspension or qualifying an order for his discharge;

(b) to make such other reports concerning the conduct of the insolvent as the court may direct, or as may be prescribed; and

(c) to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the court may direct or as may be prescribed.

He would have the right to sue and be sued by the name of "the official assignee of the property of an insolvent", inserting the name of the insolvent (Secs 77, 78, 79 & 83)

In the administration of the property, the official assignee should have regard to any resolution that may be passed at a meeting of the creditors, of course, subject to the provision of the law and the decision of the court. He may call meetings of creditors from time to time for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors by resolution at any meeting, or the court, may direct, or whenever he is requested to call the meetings by one-fourth in value of the creditors who have proved their claims (Sec. 85)

### Committee of Inspection

The court may, if it thinks fit, authorize the creditors who have proved their claims to appoint from among themselves a committee of inspection for the purpose of superintending the administration of the insolvent's property by the official assignee. The committee's powers of control over the official assignee may also be prescribed by the court. As regards Bombay, a committee shall consist of not more than five and not less than three (Sec. 88). It shall meet at such time and place as may from time to time be appointed and failing such appointment at least once in a month. It may act by a majority of its members present at a meeting, but unless a majority of the

committee is present, it shall not act. Where the committee has been appointed under Section 88 of this Act the official assignee shall, in the administration and distribution of the property of the insolvent, have regard to any direction that may be given by the committee, but any directions given to the official assignee by resolution of the creditors at a meeting shall, in case of conflict, override any directions given by the committee. Again, where a committee of inspection is appointed, the official assignee shall consult the committee before applying to the court for leave to do any of the acts under Section 68 for which the leave of the court is required as per the paragraph on duties and powers of the official assignee.

### **Remuneration of the Official Assignee**

The official assignee's remuneration would depend upon what is prescribed by the rules. According to the Bombay rules, a commission of 5 per cent on the principal amount or value of assets collected by him in each estate and a commission of 1 per cent on the value of assets taken charge of or collected by him as *interim* receiver, would be his remuneration. If, however, after any half-yearly audit, it shall appear that the amount of such commission has not reached the monthly average of Rs. 1,500, the commission shall be made up to this amount by taking the sum required from the "Unclaimed Dividend Reserve Account".

### **Distribution of Property**

The official assignee has to declare and distribute the dividends among creditors who have proved their debts with all convenient speed, and it is laid down that the first dividend (if any) shall be declared and distributed within six months after the adjudication, unless there is a good cause for postponing the declaration. The subsequent dividends, unless there is a sufficient reason to the contrary, must be declared and be payable at intervals of not more than six months. The notice of the intention to declare a dividend would be published in the prescribed manner and must be sent to each creditor named in the insolvent's schedule. After declaring a dividend, every creditor should be sent the notice showing the amount of dividend and how it is to be paid (Sec. 69).

In calculation and distribution of dividends, the official assignee must retain in his hands sufficient assets to meet the following:—

(a) debts provable in insolvency and appearing from the insolvent's statement or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;

(b) debts provable in insolvency the subject of claims not yet determined;

(c) disputed proofs or claims; and

(d) the expenses necessary for the administration of the estate or otherwise. (Sec. 71).

If it happens that any creditor has not proved his debt before the declaration of the dividend, that creditor shall be entitled to be paid out of any money which happens to be in the hands of the official assignee before it is applied to the payment of any further dividend (Sec. 72). After all the assets have been realized, or at least so much of them as can be realized without needlessly protracting the proceedings in insolvency, the official receiver shall, with the leave of the court, declare a final dividend. Before doing so, however, he must send notice to the persons who claim to be creditors, but who have not proved their claims, inviting them to do so with a notice that if they do not prove the same within the time limited by the notice he would proceed to make the final dividend without regard to their claims (Sec. 73). After this, the property of the insolvent shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons. If, after the payment of all the claims in full with interest and expenses, there remains a balance, the insolvent shall be entitled to such a balance (Sec. 76).

#### Effect of Insolvency on Antecedent Transactions

With regard to transactions entered into by the insolvent prior to his insolvency, all *bona fide* transactions are, generally speaking, protected, such as—

- (1) any payment by the insolvent to any of his creditors which does not fall under the heading of fraudulent preference ;
- (2) any payment or delivery to the insolvent *bona fide* ; and
- (3) any contract or dealing by or with the insolvent for valuable consideration.

The only condition precedent to these is that such transactions ought to have taken place before the date of the order of adjudication and that the person with whom such transactions have taken place had not, at the time, notice of the presentation of any insolvency petition by or against the debtor. Thus, any transfer of property in consideration of marriage *bona fide* made under the abovementioned condition would also be good. Other transactions, if made two years prior to the date of adjudications, would be protected (Secs. 55 & 57).

#### Execution Creditors

Where a creditor has obtained a decree of execution against the property of a debtor he would not be entitled to retain this against the official assignee unless he has realized the assets in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of the insolvency petition by or against the debtor. Otherwise any creditor or anyone interested may give notice of adjudication to the court which is executing the decree, and on receipt of such a notice, the court must direct that the property may be delivered to the official assignee

if it still be in the possession of the court. Of course, the cost of execution shall be a first charge on the property so delivered and the official assignee shall have to satisfy the charge. If, however, the property has been sold under execution, any person who buys the same in good faith would acquire a good title against the official assignee (Secs. 53 & 54).

### **Fraudulent Preference**

Fraudulent preference in insolvency is defined by Section 56 as follows :—

(1) Every transfer of property, every payment made every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.

The essential conditions to a fraudulent preference, therefore, are:—

- (1) That the payment is made by a person who is an insolvent,
- (2) that it is made to a creditor or to some one on his behalf,
- (3) that it is made without any pressure, and
- (4) that it is made with the main and dominant intention of preferring that creditor to others.

### **Preferential Debts**

In the distribution of the property of the insolvent the following debts shall be paid in priority to all other debts and shall rank equally between themselves and must be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves :—

- (a) all debts due to the Crown or to any local authority ;
- (b) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding three hundred rupees for each such clerk, and one hundred rupees for each such servant or labourer ; and
- (c) rent due to a landlord from the insolvent : provided the amount payable under the clause shall not exceed one month's rent (Sec. 49).

### **Set-off**

Where there have been mutual dealings between an insolvent and a creditor, an account is to be taken of what is due from one party to the other in respect of such mutual dealings, and the sum due from one party must be set-off against any sum due from the other party and the balance of the account shall be claimed or paid on either side.



The person claiming the set-off against an insolvent's property should not have had notice of the presentation of the insolvency petition against the debtor at the time of giving credit, otherwise he would not be entitled to claim such a set-off (Sec. 47).

### Partnership Property

In the case of partners the partnership property is applicable, in the first instance, in payment of the partnership debts and the separate property of each of the partners is applicable for the payment of their separate debts. Any surplus of either of the properties shall be dealt with as part of the other property, i.e. surplus out of private property, after paying private debts, shall be dealt with as a part of the partnership property and *vice versa* [Sec. 49(4)].

### The Order of Discharge

The insolvent can at any date, after the order of adjudication and after his public examination, apply to the court to fix a date for the hearing of the application for discharge. With regard to the public examination it need only be stated that at such an examination the insolvent is examined upon oath when he should be ready to answer all questions that may be put to him by the court or by his creditors concerning his affairs and the causes of his failure. The official assignee shall also take part in this examination. All the parties may be represented by legal practitioners. After this public examination, the court hears the application for discharge in open court and considers the report, if any, that the official assignee may have made as to the insolvent's conduct and affairs. It may thereafter either—

- (a) grant or refuse the discharge; or
- (b) suspend the operation of the order for a specified time; or
- (c) grant an order of discharge subject to conditions with respect to any earning or income which may afterwards become due to the insolvent, or with respect to his after-acquired property (Sec. 38).

The court must refuse the discharge in all cases where the insolvent has committed any offence under the Insolvency Act or under Sections 421 to 424 of the Indian Penal Code. Where the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, the court may either refuse the discharge, or suspend it for a specified time or until a dividend of not less than four annas in the rupee has been paid, unless the court is satisfied that the fact that the assets are not of such value has arisen from circumstances for which the insolvent cannot justly be held responsible. The court may, under the same circumstances, discharge the insolvent on his consenting to a decree being passed against him in favour of the official assignee for any balance, or part thereof, provable under the insolvency which is not satisfied at the date of his discharge to be paid by him out of his future earnings or after-acquired property. The same rule would apply where the insolvent has omitted to keep

proper books of account, or has continued to trade after knowing himself to be insolvent; or has contracted any debt provable in insolvency without having at the time any reasonable or probable ground of expectation that he would be able to pay it, or where the insolvency has been brought about by rash and hazardous speculation or by unjustifiable extravagance or by gambling, or by culpable neglect of his business affairs, or where the insolvent has put his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him, or incurred unjustifiable expense within three months preceding the time of presentation of the petition by bringing a frivolous or vexatious suit or within three months previous to the date of the petition, when unable to pay his debts, has given an undue preference to any of his creditors. The same result would follow if the insolvent has concealed or removed his books or his property, or has been guilty of fraudulent breach of trust (Sec. 39).

### **Provincial Insolvency Act, 1920**

This Act extends to British India as administered by Courts having jurisdiction outside the Presidency Towns and the towns of Rangoon and Karachi, whereas, as we have seen earlier in this Chapter, the Presidency Towns Insolvency Act applies to the Presidency Towns, plus Rangoon and Karachi. The Courts outside the Presidency Towns which administer jurisdiction under this Act are the District Courts, unless the local Government by notification in local official Gazette invests any Court subordinate to a District Court with jurisdiction in any classes of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

### **Court to Decide Questions**

The Court having jurisdiction shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court, or which may be considered expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. Such decision shall be binding and final (Sec.4). This Section, virtually speaking, corresponds to Section 7 of the Presidency Towns Insolvency Act of 1909. It has been decided that a Court can, under this Act inquire into a waqf executed by an insolvent. [*Abdul Hasun Khan v. B. Rajbir Prasad*, (1930) I.L.R. 6 Luck. 614.] The Court can here inquire into a disputed title and order delivery of the property to the purchaser from the official receiver. The proceedings are to be with the same procedure and powers as the Court has and which the Court exercising jurisdiction in this matter can exercise within its original civil jurisdiction.

### Acts of Insolvency

The acts of insolvency under this Act are the same as in case of the Presidency Towns Insolvency Act, which are given on pages 322-3.

### Adjudication and Petition

Where a debtor commits one of the acts of insolvency dealt with above a petition may be presented for his adjudication in insolvency, either by his creditor or by the debtor himself. In fact, where a debtor himself petitions, the presentation of such a petition by him is an act of bankruptcy by itself, independent of any other act deemed to be an act of insolvency. A creditor is not entitled to present an insolvency petition, unless the debt owing to the creditor or jointly to creditors, where two or more creditors join in the petition, come to the aggregate amount of not less than Rs. 500, and is a debt in a liquidated sum either payable immediately or at some future time and the act of insolvency should have been committed within three months before the presentation of the petition (S. 9). There is, of course, no objection to present a petition on the same day as on that on which the act of insolvency was committed. If the petitioning creditor is a secured creditor, he shall give an estimate of the value of the security and will be admitted as a creditor to the extent of the balance of the debt due to him after the deduction of the value as estimated, unless the petitioning secured creditor is prepared to relinquish his security for the benefit of the creditors.

If, however, the petition is presented by the debtor he shall not be entitled to do so unless he is unable to pay his debts which amount to Rs. 500 or more; or if he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or an order of attachment in execution of such a decree has been made, and is subsisting, against his property (S. 10). It may, however, be added that joint stock companies or corporations which were formed under any enactment for the time being in force, cannot be petitioned in an insolvency court. Once a petition is presented it cannot be withdrawn without the leave of the Court (S. 14). However, if two or more insolvency petitions are presented against the same debtor or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, as the Court thinks fit (S. 15). Should the debtor against whom the petition has been presented die, the Court may continue the proceedings so far as may be necessary for the realization and distribution of the property of the debtor (S. 17). Here it makes no difference whether the petition is presented by a creditor or the debtor himself. (*Ramathai Anni v. Kannappa Mudaliar*, (1928) I.L.R. 51 Mad. 495.) The heirs of the deceased insolvent, however, will have to be brought on the record for further proceedings after his death.

### **Interim Receiver**

The Court may appoint an interim receiver and while admitting the insolvency petition it may, where the petition is by a creditor, and shall, if it is by the debtor, appoint a receiver of the property of the debtor, who may be directed to take immediate possession of the property. The receiver has the usual powers of a receiver under the Civil Procedure Code (S. 20).

### **Interim Proceedings Against the Debtor**

At the time of making the order admitting the petition or at any subsequent date prior to adjudication, the Court may either of its own motion or on the application of any creditor

- (1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and in case of default of giving such security, he shall be detained in the civil prison ;
- (2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Civil Procedure Code, or by any other enactment ;
- (3) order a warrant to issue, with or without bail, for arrest of the debtor, ordering either that he should be detained in a civil jail or be released on such terms as security as may be reasonable and necessary.

The order under clauses 2 and 3 shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court, has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to do so ; or where the debtor has failed to disclose or has concealed, destroyed, transferred or removed from such local limits, or is about to do so, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property (S. 21). There is no provision in the Presidency Towns Insolvency Act equivalent to the provisions under Sections 21 to 33 of this Act, for the simple reason that in the Presidency Towns Insolvency Act there is no intermediate stage between the presentation of the petition and the actual adjudication of the debtor, as there is in the other courts of British India.

The debtor, of course, during the interim proceedings, must produce all books of accounts and give such inventories of his property and lists of his creditors and debtors and of the debts due to and from them as may be required. He must also submit himself to such examination in respect of his property or his creditors and attend on due dates and times appointed by the Court before the Court of

Receiver, execute instruments and generally do all such acts in relation to his property as he may be required to do by the Court or the Receiver (S. 22).

### Hearing of the Petition

On the date appointed by the Court for the hearing of the petition and on subsequent days during which the hearing progresses, the first duty of the Court will be to be satisfied that the creditor or the debtor, as the case may be, is entitled to present the petition. Where the petition is presented by a creditor and the debtor is not present, the Court has to be satisfied that notice of the order admitting the petition has been served on the debtor. Last but not the least, it must be established that the debtor has committed an act of insolvency as alleged against him. If the debtor is present, the court shall examine him as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to put such questions to the debtor on the petition as are relevant (S. 24). If the Court is not satisfied at the hearing of the petition with the proof of any of these, it shall dismiss the petition (S. 25). Not only this, but in case of the creditor's petition the Court may even award compensation to the debtor if it is satisfied that the petition was frivolous or vexatious, not exceeding Rs. 1,000 (S. 26).

### Order of Adjudication

If at the hearing the Court is satisfied as to the proofs produced, an order of adjudication shall be made in which the Court must specify the period during which the debtor must apply for his discharge. This period may be extended at the discretion of the Court. The effect of the adjudication order is that the whole of the property of the debtor vests in the court or the official receiver and becomes divisible among creditors. The result is that all properties belonging to the insolvent debtor, or under his order or disposition in his trade or business, fall under the power of the Court or receiver. Not only this but all other property which devolves on the insolvent debtor or are acquired by him after the adjudication order and before the discharge also forthwith vests with the Court or receiver.

### Doctrine of Relation Back

The doctrine of relation back has been fully dealt with in connection with the Presidency Towns Insolvency Act on page 326-7 which should be carefully studied. This doctrine in the Provincial Insolvency Act occurs under Section 28(7), which lays down that an order of adjudication relates back to and takes effect from the date of the presentation of the petition on which it is made. The law all throughout is the same under both the Acts.

### **Proof by Creditors**

After the adjudication order all persons who claim to be creditors of the insolvent must tender proof of their respective debts as to the amount and particulars thereof and the court, by order, determines the persons who have proved themselves to be creditors of the insolvent, stating the amount for which they have so proved. Thus a schedule of creditors and their claims shall be prepared. In the case of any debt, the value of which is incapable of being proved and ascertained in the opinion of the Court, the same shall not be included in the schedule. This schedule shall be posted in the Court-house (S. 33).

### **Annulment by the Court**

Where the Court thinks that the debtor ought not to have been adjudged an insolvent or that the insolvency debts have been paid up in full, the Court, on application by the debtor, or any other person interested, annul the adjudication (S. 35).

### **Composition and Schemes of Arrangement**

After the making of the order of adjudication, it is quite open for a debtor to submit a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, whereupon the Court fixes a date for the consideration of the composition, issuing notices to all creditors. If at the creditors' meeting when the scheme of composition or of arrangement is placed before them, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors. The Court thereupon has the option either to approve or refuse the proposal as it thinks fit. The Court may, if it is of the opinion, after hearing the report of the receiver, where a receiver is appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors refuse to approve the proposal. In any other case the Court may either approve or disapprove.

### **Debts not wiped off by Discharge or Composition**

The debts which are not wiped off by discharge or composition are the same as in the case of Presidency Towns Insolvency Act under Section 45 of that Act, from which the Provincial Insolvency Act, Section 44 has been adopted. These debts are given in detail on page 328 in this Chapter.

### **Order of Discharge**

An insolvent may apply for his discharge at any time after his adjudication and the Court fixes a day giving notice in such a manner

as may be prescribed for the hearing of the application of discharge. The Court after the hearing may pass any of the following three orders :—

- (1) Grant or refuse an absolute order of discharge ; or
- (2) suspend the operation of the order for a specified time ; or
- (3) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property (S. 41, S.s. 2).

Where there is reason to refuse the discharge the Court may do so even though there is no opposition to it. If, however, the Court imposes conditions to the discharge, it has been laid down that the conditions should not be so imposed as to make them tantamount to an absolute refusal of discharge. (*Re James, Ex parte James*, (1890) 25 Q.B.D. 285.) The Court must grant an absolute order of discharge if it is proved that—

- (1) the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless it is shown by the insolvent that this position has risen from circumstances for which he cannot justly be held responsible ;
- (2) the insolvent has omitted to keep books of account as are usual and proper in the business carried on by him with a view to sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ;
- (3) the insolvent has contracted any debt provable under this Act without having at the time of doing so any reasonable or probable ground or expectation that he would be able to pay it ;
- (4) he has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;
- (5) the insolvent has brought on, or contributed to his insolvency by rash speculation, or unjustifiable extravagance in living, or gambling, or culpable negligence of his business affairs ;
- (6) the insolvent has within three months preceding the date of the presentation of the petition given an undue preference to any of his creditors ;
- (7) the insolvent on any previous occasion has been adjudged an insolvent or made a composition or arrangement with his creditors ;
- (8) he has concealed or removed his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust (S. 42).

### **Mutual Discharge and Set-off**

This point has been dealt with on page 322 of this Chapter in connection with the Presidency Towns Insolvency Act, which should be referred to as the law is the same on this point.

### **Fraudulent Preference**

In connection with preferential debts, i.e. where the insolvent pays after committing an act of insolvency any creditor in full in priority to other creditors, the essential conditions to be proved in a Court of law are :—

- (1) that the payment is made by a person who is an insolvent,
- (2) that it is made to a creditor or to some one on his behalf,
- (3) that it is made without any pressure, and
- (4) that it is made with the main and dominant intention of, preferring the creditor to others.

### **Official Receiver**

The Local Government may appoint such persons as it thinks fit as Official Receiver for any local limits and in that case the Court under whose jurisdiction he so acts may appoint as receiver for the purpose of every order appointing a receiver or an interim receiver. The official shall receive such remuneration as the Local Government may fix. Where no receiver is appointed the Court shall have all the rights of and may exercise all the powers conferred on a receiver under this Act.

### **Powers and Duties of the Official Receiver**

The powers and duties of a receiver so appointed are that—

- (1) he can sell all or any part of the property of the insolvent ;
- (2) give receipts for any money received by him ; and with the consent of the Court may :—
  - (a) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;
  - (b) institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent and for that purpose employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court ;
  - (c) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security as the Court may think fit ;
  - (d) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts ;



- (e) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ;
- (f) divide in its existing form amongst the creditors, according to its estimated value, and property which, from its peculiar nature or other special circumstances, cannot be readily or advantageously be sold (S. 59).

### **Priority of Debts**

In the payment of debts while distributing the debtor's property, after all secured creditors have been paid out of their securities, the following shall have priority, viz. :—

- (1) all debts due to the Crown or to any local authority, and
- (2) all salary or wages, not exceeding Rs. 20 in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition. These debts will rank in priority between themselves, unless the property of the insolvent is insufficient to meet them, in which case they shall be paid in equal proportions between themselves. In case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts. Where there is a surplus of separate property of the partners, it shall be dealt with as part of the partnership property ; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property. If all the debts are paid off and a surplus remains, same shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of 6 per cent per annum on all debts entered in the schedule. If after payment of all debts there is a surplus, the surplus, of course, belongs to the insolvent (S. 61).

## CHAPTER XVII

### ARBITRATION

#### ARBITRATION

THE present Arbitration Act X of 1940 is a comprehensive Act specially passed in order to repeal the old Indian Arbitration Act IX of 1899 and the provisions of the Code of Civil Procedure (Act of 1908) and in its place to provide a complete legislation on the subject.

#### Arbitration Agreement

An Arbitration Agreement is defined by the Act of 1940 as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not [S. 2(a)]. In the old Act this was called Submission. It will thus be seen that there cannot be an arbitration without a written agreement.

#### Modes of Submission

A submission to arbitration may be made under one of the following three circumstances, viz. where :—

(1) A submission is made by an "arbitration agreement" by the parties independently without the intervention of the Court, and the assistance of the Court is only applied for in the matter of the award being filed in the Court and being forced as a decree.

(2) Where the parties enter into an "arbitration agreement" before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, any or all the parties, instead of proceeding with an arbitration, may apply to the Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court. The Court thereupon directs notices to be sent to all the parties to the agreement, other than the applicants, requiring them to show cause within the time specified in the notice as to why the agreement should not be filed and where no sufficient cause is shown, orders the agreement to be so filed. Here the Court also makes an order of reference to the arbitrator appointed by the parties, whether in the arbitration agreement or otherwise, and when the parties do not agree upon an arbitrator, the Court refers the matter to an arbitrator appointed by the Court. Under these circumstances the arbitration proceeds in accordance with the provisions of the Arbitration Act of 1940, as far as they are applicable (S. 20).

(3) The third case is where a suit has already been filed and all the parties in the suit agree that the matter in difference between

them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference (S. 21).

## (1) ARBITRATION WITHOUT INTERVENTION OF THE COURT

### Who may Refer to Arbitration

Generally speaking, any person who can enter into a contract can submit to arbitration as long as he is interested in the subject-matter.

An *agent* duly authorised may enter into a submission agreement and bind his principal.

A *partner* in a trading firm cannot submit to arbitration without the authority of all the other partners.

*Bankrupts* cannot submit disputes, in respect to which they are parties, to arbitration so as to bind their estates. If they do so, it will have the effect of binding themselves personally and not their estates or the official assignee.

*Infants* cannot submit to arbitration so as to be bound by the award. The guardian of a *lunatic* may consent on behalf of a lunatic to a submission to arbitration.

*Attorneys* and *Counsel* can refer the case of their clients to arbitration with the consent of their clients, but not against their expressed consent.

### Companies

Under the Indian Companies Act of 1913, Section 152, a company may, by written agreement refer to arbitration in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

Companies, which are parties to the arbitration, may delegate to the arbitrator the power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

The provisions of the Indian Arbitration Act, 1940, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, should apply to all arbitrations between companies and persons in pursuance of the Act.

### What matters can be Referred

Generally speaking, all matters, which can be made the subject of a contract, may be referred to arbitration. Thus, purely criminal matters cannot be submitted to arbitration; but any civil difference or civil right, for which a criminal prosecution is also instituted, may be referred to arbitration so far as the civil side of the question

is concerned. A divorce suit cannot be submitted to arbitration, as in such cases the jurisdiction of the matrimonial court is exclusive, but the terms of separation may be submitted to arbitration.

### Provisions Implied in an Arbitration Agreement

An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the following provisions which have been set out in the First Schedule of the Act of 1940, as far as they may be applicable :—

(1) Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

(2) If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

(3) The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

(4) If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree the umpire shall forthwith enter on the reference in lieu of the arbitrators.

(5) The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

(6) The parties to the reference and all persons claiming under them shall subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which during the proceedings on the reference, the arbitrators or umpire may require.

(7) The award shall be final and binding on the parties and persons claiming under them respectively.

(8) The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioners and client.

### The Arbitrator

The arbitrator is a person selected by the mutual consent of the parties to an arbitration for the purpose of settling differences submitted to him. The arbitrator may be any person, and if the parties like, they may even select an infant or a lunatic. Once having selected an incompetent person they cannot object to his acting, on the ground of incompetency. Generally, however, arbitrators are selected on the ground either of their capacity, technical knowledge or friendship or mutual confidence of the parties to the

arbitration agreement. The submission itself generally appoints and names the arbitrator or arbitrators. The matter may preferably be referred to a single arbitrator, but as is frequently the case, two or more arbitrators are appointed, each party selecting an arbitrator of his own choice. Though there is no legal objection to this course, from a practical standpoint it is always preferable to select a single arbitrator as far as possible; otherwise the tendency is for each arbitrator to look upon himself as an advocate of the party selecting him. If more than one arbitrator is appointed, a provision should also be made in the arbitration agreement for the appointment of an umpire who could act, in case the arbitrators disagree, and more preferably the umpire may also be named. Sometimes it is provided that the arbitrators themselves may select their own umpire in case they disagree. It may also happen that the party to an arbitration agreement may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated in the arbitration agreement, and such a person may be designated either by name or as the holder for the time being of any office or appointment, as, for example, the President of the Chamber of Commerce (S. 4).

It may be added here that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless the agreement itself provides otherwise (S. 5). An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased. On the same principle, the authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed (S. 6). Where, however, one of the parties to an arbitration agreement becomes insolvent and it is provided by a term in such an agreement that any differences arising shall be referred to arbitration and if the receiver adopts this agreement, the said arbitration agreement shall be enforceable by or against him as far as it relates to any such differences [S. 7(1)]. In such a case where such a rule of Section 7(1) does not apply, the court may if it is of the opinion that the other party to the agreement or the receiver on the insolvency of one of the parties to the arbitration agreement may apply to the Court having jurisdiction in insolvency proceedings, for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement. In such a case, the Court may, if it is of the opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly [S. 7(2)]. Here the receiver includes an official assignee.

Again where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, and each one of the appointed arbitrators neglects or refuses to act or

is incapable of acting, or dies, the party who appointed him can appoint a new arbitrator in his place. If one party fails to appoint an arbitrator, either originally or by way of substitution, as in the case mentioned above for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties, as if he had been appointed by consent. This is, of course, subject to the condition that the Court may set aside any appointment as sole arbitrator or may on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit (S. 9). If there is a provision in an arbitration agreement for the appointment of three arbitrators and it is stated that the two parties shall appoint one arbitrator for each of them and that the third arbitrator shall be selected by the two arbitrators appointed by the parties, the appointment of the third arbitrator shall have the same effect as if the provision was for the appointment of an umpire and not that of a third arbitrator [S. 10(1)]. Where, however, the arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in Section 10(1), the award of the majority of the arbitrators, unless the arbitration agreement otherwise provides, shall prevail. Where more than three arbitrators are provided by the agreement, the award either of the majority, or in a case they are equally divided, the award of the umpire shall prevail, unless the agreement otherwise provides [S. 10(2)].

### **Power of Court to Appoint Arbitrators**

This is laid down in Section 8 of the Arbitration Act of 1940 to the effect that, where any of the parties fails to make an appointment, the Court has power to appoint arbitrators in cases of private arbitration by agreement in the following cases :—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen concur in the appointment or appointments ; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy ; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him. In such a case where the appointment by the Court is made, any party may serve the other parties or the arbitrators, as the case may be, with a written notice

to concur in the appointment or appointments or in supplying the vacancy, and if in spite of that notice, if the appointment is not made within 15 clear days after the service of notice, the Court may, on application by the party giving the notice and after giving an opportunity to the other parties of being heard, appoint an arbitrator, or arbitrators or umpire, as the case may be. These appointees shall have like power to act in the reference and to make an award as if they have been appointed by consent of all parties (S. 8).

### Powers and Duties of Arbitrators

The powers of an arbitrator or umpire, subject to an agreement to the contrary, are the following :—

- (a) administer oath to the parties and witnesses appearing ;
- (b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court ;
- (c) make the award conditional or in the alternative ;
- (d) correct in an award any clerical mistake or error arising from any accidental slip or omission ;
- (e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary (S. 13).

The duty of an arbitrator is to act with impartiality. He should have no personal interest in the matter in dispute, but if he happens to be an interested party, of which the parties had notice at the time of appointment, the arbitration agreement would be good. He should also see that he accepts no hospitality from any of the parties to the reference. If it is proved to the satisfaction of the Court that the effect of his accepting hospitality was to bias his mind in favour of the parties offering such hospitality, the Court will interfere to set aside the award. It has also been held that the authority of the arbitrator commences from the moment of time he begins with the business of reference and not from the time of his appointment. (*Baker v. Stephen*, L.R.Q.B. 523.) It is also the duty of an arbitrator to consult the convenience of the parties as far as possible. The proceedings before the arbitrator should be in the form, as far as possible, of a suit, and the party in the position of the plaintiff in a civil suit, must begin. The parties have a right to appear in person or may be represented by a legal adviser. It is, however, necessary that the party proposing to be represented by a counsel or a pleader must give the opposite party notice to that effect so that the other party may also make its own arrangement, if it so chooses. (*Whately v. Morland*, 2 Dowl., 249.) In this case the Court interfered because the arbitrator refused to adjourn a meeting to enable a party to engage a counsel when the other party unexpectedly appeared by counsel. After the party in the position of the plaintiff has

opened the case, and called evidence, the party in the position of the defendant must open the case and call evidence. Next, the defending party must address, to which the party in the position of the plaintiff must respond. A lay arbitrator is allowed to have a legal adviser to sit with him during the proceedings, but such an adviser has no power of interference in the arbitration proceedings and his only function is to advise, which advice may not be accepted by the arbitrator. The arbitrator must also see that all the proceedings go on in the presence of the parties or their legal representatives, except in cases where he is justified in acting *ex parte* after due notice, as stated above.

### The Award

The award is the written decision of the arbitrator or the umpire.

\*Section 14 of the Act states as follows :—

(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of Section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award (S. 14).

### Modification or Correction of Award

The Court may modify or remit the award. In the case of modification the Court interferes where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred to. Another case where the Court modifies is where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision. The third case is where there is a clerical error or mistake arising from an accidental slip or omission (S. 15).

### Remittance of Award

In case of remitting an award, the Court will do so where the award has left undetermined any of the matters referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred. The other case for remitting an award arises where the award is so indefinite as to be incapable



of execution, or where an objection to the legality of the award is apparent upon the face of it [S. 16(1)]. When the Court remits an award under these circumstances the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court, subject, of course, to the extension of the time so fixed by a subsequent order of the Court [S. 16(2)]. Where an award is remitted and the arbitrator or umpire fails to reconsider it and submit his decision within the time fixed, it shall become void [S. 16(3)].

### **Interim Award and Extension of Time**

It shall be further noticed that the arbitrators or umpire may make an interim award, unless the agreement otherwise provides. The same rules of law prevail under an interim award as under a final award (S. 27). Where a time for the making of an award is fixed, the Court may, if it thinks fit, before or after the expiry of the said time, and whether or not the award has been made, enlarge from time to time the time for making the award. Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect (S. 28).

### **Setting aside of an Award**

An award may be set aside on the following grounds :-

(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid ;

(c) that an award has been improperly procured or is otherwise invalid.

### **Removal of an Arbitrator or Umpire**

The Court may on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award ; or where the arbitrator or umpire has misconducted himself or the proceedings. The arbitrator or umpire so removed shall not be entitled to receive any remuneration in respect of his services (S. 11).

### **Judgment in terms of Award**

Where the Court sees no cause to remit or set aside the award or any of the matters referred to arbitration, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, has been refused, proceed to pronounce judgment according to the award. On the judgment so

pronounced a decree shall follow, and no appeal shall lie from such decree, except on the ground that it is in excess of, or not otherwise in accordance with, the award (S 17) The Court may, however, pass interim orders at any time after the filing of the award, whether notice of the filing has been served or not, on being satisfied by affidavit or otherwise, that the party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary The person on whom such interim orders have been passed may, of course, show cause against such orders and the Court may, on hearing him, pass such further orders as it deems necessary and just (S 18) Where the award is set aside or becomes void the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred (S 19)

## **(2) REFERENCE ORDER OR AGREEMENT TO REFER**

Where parties have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement and a difference has arisen to which the agreement applies, they may instead of proceeding as in a case of a reference out of Court apply to the Court having jurisdiction in the matter that the agreement be filed The application has to be in writing and the Court after giving notice to all the parties may order the agreement to be filed after hearing them and shall make an order of reference to the arbitrator or arbitrators appointed by the parties either in the agreement or otherwise When the parties agree to the appointment of an arbitrator the Court will appoint the same arbitrator In this case the arbitration proceeds under the Arbitration Act Where there is a difference or dispute as to the arbitrator's remuneration or costs, or where any arbitrator refuses to deliver the award except on payment of the fees demanded by him, the Court may, on application of the parties, order the delivery of the award on payment of the fee demanded by the arbitrator to the Court and thereafter may order what sum, if any, out of the said amount should be paid to the arbitrator or umpire, which to the Court seems reasonable (S 38)

## **(3) ARBITRATION IN SUITS, OR SUBMISSION BY CONSENT IN SUITS**

After the parties have filed a suit in a Civil Court in connection with any difference between them, they may, before judgment is pronounced, apply in writing to the Court for an order of reference, in which case the arbitrator shall be appointed in such a manner as may be agreed upon between the parties (Ss 21 & 22). The Court by order may refer to the arbitrator the matter in reference and shall

in the order specify such terms which the Court thinks reasonable for the making of the award. Once the matter is referred to arbitration the Court shall not deal with such matter, except as allowed by the Arbitration Act. Where some of the parties to the suit wish to refer the matter to arbitration and the others do not, the Court may, provided the matter in which the parties are interested can be separated from the subject-matter of the suit, refer it to arbitration (S. 24).

### Appealable Orders

An appeal shall lie from the following orders passed under the Arbitration Act of 1940 and from no others to the Court authorized by law to hear appeals:

An order—

- (i) superseding an arbitration ;
- (ii) on an award stated in the form of a special case ;
- (iii) modifying or correcting an award ;
- (iv) filing or refusing to file an arbitration agreement ;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement ;
- (vi) setting aside or refusing to set aside an award ;

provided that the provisions of this section shall not apply to any order passed by a Small Causes Court.

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appear to His Majesty in Council (S. 39).

## CHAPTER XVIII

### LIMITATION AND STAMPS

THE LAW as to the limitation of **suits, appeals and certain applications** to the Court is to be found consolidated and amended in the Indian Limitation Act of 1908.

The stamp law of India is laid down by the Indian Stamp Act of 1899, as amended by the Acts of 1904, 1906, 1910 and 1912, respectively.

The object of the present Chapter is to state briefly the rules as to limitation and the stamp law in connection with only those documents in which a businessman or a public accountant is likely to be interested.

### LIMITATION

#### General Rules

The Act lays down the various periods of limitation within which a **suit, appeal, or application** must be made otherwise it will be dismissed. When such a period expires on a day on which the court is closed, the appeal or application may be referred or instituted on the day on which the court reopens (Secs. 3 & 4, I. L. Act). It will thus be seen that in India under the Act the court must, as soon as it finds that the period has expired, **dismiss the suit**, irrespective of the fact whether limitation was pleaded or not. In England limitation has to be specifically pleaded as a defence, otherwise the court does not take notice of it on its own motion.

#### Disability

In cases of *minors, insane persons, idiots*, etc., during whose incapacity the period of limitation is to be reckoned, the **usual period does not begin to run until after the disability has ceased**. If this disability does not cease till death, the legal representatives of these incapacitated parties may institute the suit, application, etc., within the same period after the death as would otherwise have been allowed from the time so prescribed. In a case of the disability of the representatives themselves the same rules shall apply (Sec. 6, I. L. A.). Again, where one of several persons, say a partnership firm, *who is jointly entitled to institute suits*, etc. happens to be incapacitated and if a discharge can be given without the concurrence of such a person, time will run against them all: but if no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others,

or until the disability of the person in question has ceased; e.g. A incurs a debt to a firm of which B, C and D are partners; B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D. If, on the other hand, D was also insane, time will not run until either the minor comes of age or B or D becomes sane (Sec. 7, I. L. A.). This rule applies only to disabilities which existed at the time limitation began to run. If, however, the limitation period has already begun to run, no subsequent disability or inability to sue stops it. The only exception to the rule is where a creditor is granted letters of administration to the estate of his debtor, for in this case the running of time prescribed by limitation is suspended while the administration continues (Sec. 9, I. L. A.). This does not apply to an executor because in the former case the suspension to the period was brought about through an act of law, whereas the appointment of an executor is a voluntary act on the part of the testator, and according to the English Common law, where a testator appoints his debtor executor, he is presumed to have forgiven the debt inasmuch as he was the only person who could collect it. The rule of equity which, however, prevails both in England and in India now, is that as soon as the executor debtor accepts office he is presumed to have at once paid himself, in his capacity as an executor, and so holds that amount in trust on behalf of the estate. (*Yakub Ibrahim v. Bu Rahimathai*, 10 Bom. L.R. 346.)

### Foreign Contracts

Contracts entered into in foreign countries of which suits are instituted in British India are subject to the rules of limitation contained in our Indian Act. If, however, both the parties are domiciled in a foreign country during the whole of the period of limitation, in accordance with the rule of the foreign country where it was entered into, which has extinguished the contract, it would be a good defence (Sec. 11, I. L. A.).

### COMPUTATION OF THE PERIOD

In computing the period of limitation, the time from which such a period is to be reckoned shall be excluded. In other words, it is to be counted from midnight of the day from which such period is to be reckoned. In the case of an appeal from a suit, the time requisite for obtaining a copy of the judgment on which the appeal is to be founded shall be excluded. In case of application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded (Sec. 12, I. L. A.). In computing the period of limitation, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of the Government shall be excluded (Sec. 13, I. L. A.). This rule will

not apply where the defendant, though absent personally, has an agent in British India duly constituted. If, however, the plaintiff has been prosecuting with due diligence, and in good faith, another civil proceeding against the defendant, founded upon the same cause of action, which the court, from defect of jurisdiction or other cause of a like nature, is unable to entertain, the time so spent shall be excluded (Sec. 14, I. L. A.).

Where a person has been kept from instituting a suit or application, by want of knowledge arising through fraud, or the document necessary to establish such right has been fraudulently concealed from him, as against the person guilty of the fraud or accessory to it, or claiming through him otherwise than in good faith and for valuable consideration, the time shall be computed from the moment when the fraud first became known to the person concerned when he first had the means of producing or compelling production of the concealed document (Sec. 18, I. L. A.). This rule operates only against the person guilty of the fraud or against those claiming under such persons. If this fraud is committed by an agent or servant of the party, it should be proved that it was committed for the general or special benefit of the principal.

### **Acknowledgment in Writing**

Section 19 of the Limitation Act lays down as follows:—

(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

The explanation to the section further lays down to the effect that the acknowledgment may be sufficient though

“it omits to specify the exact nature of the property or right, or avers that the time of payment, delivery, performance or enjoyment has not yet come, or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than the person entitled to the property or right.”

The signature may be of the person himself or his duly authorized agent.

From the above it will be noticed that the acknowledgment must have been made before the expiry of the limitation period. However, a writing obtained after the expiration of such a period, as per Section 25 of the Contract Act, may still save the suit from being barred in

case it also embraces a promise to pay the debt as contemplated by this Section of the Contract Act. In one case a letter in which the debtor promised to pay the debt by instalments and requested to be excused the payment of interest, was held to be a good acknowledgment of the debt. (*Shah Mukhum v. Imtiazood*, 10 Moore, I.A. 362.)

### Part Payment or Payment of Interest

Where a part payment of the principal debt or interest on a legacy is made, before the expiration of the prescribed period, by the debtor or his duly authorized agent, a fresh period of limitation shall be computed from the time when the payment was made. In the case of part payment, the fact that the payment was made must appear in the handwriting of the person making the same. The debt would include money payable under a decree or order of court (Sec. 20, I. L. A.). The payment, of course, should have been made to the creditor or his duly authorized agent and not to a stranger, unless the latter payment is made at the request of the creditor.

*Table showing the time limit in cases specially selected from the First Schedule of the Indian Limitation Act which are considered to be of importance and interest to businessmen.*

Description of Suit	Period of Limitation	Time from which period begins to run.
For the wages of a household servant, artisan or labourer not provided for by this Schedule, Art. 4.	One year	When the wages accrue due
For the price of food or drink sold by the keeper of an hotel, tavern or lodging house.	„	When the food or drink is delivered
For the price of lodging.	„	When the price becomes payable.
To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	„	The date of the final decision or order in the case by a Court competent to determine it finally.
To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	„	The date of the act or order.
Against Government for compensation for land acquired for public purposes.	„	The date of determining the amount of the compensation.
For compensation for slander.	„	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.

Table—contd.]

Description of Suit.	Period of Limitation	Time from which period begins to run.
For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
Against a carrier for compensation for losing or injuring goods.	"	When the loss or injury occurs.
Against a carrier for compensation for non-delivery of or delay in delivering goods.	"	When the goods ought to be delivered.
For compensation for infringing a copyright or any other exclusive privilege.	Three years	The date of the infringement.
To restrain waste.	"	When the waste begins.
For the hire of animals, vehicles, boats or household furniture.	"	When the hire becomes payable.
For the balance of money advanced in payment of goods to be delivered.	"	When the goods ought to be delivered.
For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	"	The date of the delivery of the goods.
For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	"	When the period of credit expires.
For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	"	When the period of the proposed bill elapses.
For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	"	When the work is done.
For money payable for money lent.	"	When the loan is made.
Like suit when the lender has given a cheque for the money.	"	When the cheque is paid.
For money lent under an agreement that it shall be payable on demand.	"	When the loan is made.
For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	"	When the demand is made.



Table--contd.]

Description of Suit.	Period of Limitation	Time from which period begins to run.
For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	"	When the money is received.
For money payable for interest upon money due from the defendant to the plaintiff.	"	When the interest becomes due
For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them	"	When the accounts are stated in writing signed by the defendant or his agent duly authorized in his behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives
For compensation for breach of a promise to do anything at a specified time, or upon the happening of a special contingency.	"	When the time specified arrives or the contingency happens
On a bill of exchange or promissory note payable at a fixed time after date	"	When the bill or note falls due
On a bill of exchange payable at sight or after sight, but not at a fixed time	"	When the bill is presented
On a bill of exchange accepted payable at a particular place.	"	When the bill is presented at that place
On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	"	When the fixed time expires.
On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	"	The date of the bill or note.
On a promissory note or bond payable by instalments.	"	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.

*Table—contd.]*

Description of Suit.	Period of Limitation	Time from which period begins to run.
On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	"	The date of the delivery to the payee.
On a dishonoured foreign bill, where protest has been made and notice given	"	When the notice is given.
By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance	"	The date of the refusal to accept
By the acceptor of an accommodation bill against the drawer	"	When the acceptor pays the amount of the bill
Suit on a bill of exchange promissory note or bond not herein expressly provided for	"	When the bill, note or bond becomes payable
By a surety against the principal debtor	"	When the surety pays the creditor
By a surety against a co-surety	"	When the surety pays anything in excess of his own share
Upon any other contract to indemnify	"	When the plaintiff is actually indemnified.
By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to time when such costs are to be paid.	"	The date of the termination of the suit or business or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance
For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	"	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account
On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	"	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person

Table—contd.]

Description of Suit.	Period of Limitation	Time from which period begins to run.
By the assured to recover premium paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.
Against a factor for an account.	"	When the account is during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.
By a principal against his agent for movable property received by the latter and not accounted for.	"	Idem
Other suits by principals against agents for neglect or misconduct	"	When the neglect or misconduct becomes known to the plaintiff.
For a seaman's wages	"	The end of the voyage during which the wages are earned.
For wages not otherwise expressly provided for by this schedule.	"	When the wages accrue due
For an account and a share of the profits of a dissolved partnership	"	The date of the dissolution
For arrears of rent	"	When the arrears become due
For a call by a company registered under any Statute or Act.	"	When the call is payable
For specific performance of a contract	"	The date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused.
For the rescission of a contract.	"	When the facts entitling the plaintiff to have the contract rescinded first became known to him.
For compensation for the breach of any contract, express or implied, not in writing registered and not here-in specially provided for	"	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

## STAMP LAW

The stamp Act extends to the whole of British India inclusive of Upper Burma, Baluchistan, the Santhal Paraganas and the Paragana of Spiti.

### Modes of Stamping

The stamp indicating the duty with which the various instruments are chargeable is either impressed or adhesive.

The following instruments may be stamped with adhesive stamps namely :—

- (a) Instruments chargeable with the duty of one anna (or half an anna) except parts of bills of exchange payable otherwise than on demand and drawn in sets;
- (b) bills of exchange, cheques and promissory notes drawn or made out of British India;
- (c) entry as an advocate, vakil or attorney on the roll of a High Court;
- (d) notarial acts; and
- (e) transfers by indorsement of shares in any incorporated company or other body corporate (Sec. 11, S.A.).

The law throws the duty of cancelling the adhesive stamp on such instruments on the party affixing it and, failing that, on whoever executes such an instrument.

“ Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.”

The cancellation may be made by writing the name or initials of the canceller or by writing the true date of the writing across the stamp (Sec. 12, S. A.). All instruments chargeable with duty and executed in British India shall be stamped before or at the time of execution (Sec. 17, S. A.). On the other hand, the instrument chargeable with stamp duty and executed outside British India, not being a bill of exchange, cheque or promissory note, may be stamped within three months after it has been first received in British India (Sec. 18).

### Bills of Exchange

“ A bill of exchange means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a *hundi*, and any other document entitling or purporting to entitle any person whether

named therein or not, to payment by any other person of, or to draw upon any person for, any sum of money." [Sec. 2(2), S. A.].

The above definition lays down what class of instruments should be stamped in accordance with the requirements of this Act applying to documents described by the Act as bills of exchange. The stamp duty on a bill of exchange has to be paid by the person drawing and making it unless there is an agreement among the parties to the contrary. In the case of foreign bills, i.e., those drawn out or made outside British India, the first holder in British India should affix a proper stamp to it and cancel it before he presents it for acceptance, payment, or indorsement, or indorses the same himself or negotiates the same in any other manner, unless the same was duly stamped at the time it came into his hands (Sec. 19, S. A.) An unstamped bill of exchange is inadmissible in evidence (Sec. 35, S. A.). The drawing, making, issuing or indorsing or transferring or signing of any bill of exchange, cheque or promissory note without the same being duly stamped is made penal, the guilty party being liable to a fine not exceeding five hundred rupees (Sec. 62). Where bills are drawn or executed in a set of two or more, they must all be stamped at the time of such drawing or executing, otherwise the party drawing or executing shall be liable to a fine not exceeding one thousand rupees (Sec. 67). On the same principle, if a person post dates or indorses and presents for acceptance a bill with a view to defraud the Government of duty, he makes himself liable to a fine to the same extent (Sec. 68).

A bill of exchange payable on demand, for the purposes of the stamp law, includes—

- (a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;
- (b) an order for the payment of any sum of money weekly, monthly, or at any other stated periods; and
- (c) a letter of credit, that is to say, any instrument by which one person authorizes another to give credit to the person in whose favour it is drawn [Sec. (3)].

In India the stamp duty payable on bills of exchange is as follows:—

- (a) Where payable on demand .. .. . 1 anna.
- (b) Where payable otherwise than on demand but not more than one year after date or sight—

		If drawn singly	If drawn in sets of two, for each part of the set	If drawn in sets of three for each part of the set
When the amount of the bill or note does not exceed Rs. 200		Rs. a.	Rs. a.	Rs. a.
If it exceeds Rs. 200 but does not exceed Rs. 400		0 3	0 2	0 1
Do. 400	do. 600	0 6	0 3	0 2
Do. 600	do. 800	0 9	0 5	0 3
Do. 800	do. 1,000	0 12	0 6	0 4
Do. 1,000	do. 1,200	0 15	0 8	0 5
Do. 1,200	do. 1,600	1 2	0 9	0 6
Do. 1,600	do. 2,500	1 8	0 12	0 8
Do. 2,500	do. 5,000	2 4	1 2	0 12
Do. 5,000	do. 7,500	4 8	2 4	1 8
Do. 7,500	do. 10,000	6 12	3 6	2 4
Do. 10,000	do. 15,000	9 0	4 8	3 0
Do. 15,000	do. 20,000	13 8	6 12	4 8
Do. 20,000	do. 25,000	18 0	9 0	6 0
Do. 25,000	do. 30,000	22 8	11 4	7 8
and for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000		27 0	13 8	9 0
		9 0	4 8	3 0

(c) Where payable at more than one year after date or sight the same duty as a bond.

### Duty on a Bond

Where the amount or value secured does not exceed Rs. 10.	India—Annas two Bengal, Madras, Punjab, Assam. U. P.—Annas two.	Bombay, C. P.
Where it exceeds Rs. 10 and does not exceed Rs. 50	India—Annas four Bengal, Madras, Punjab, Assam. U. P.—Annas four.	Bombay, C. P., Assam,
Where it exceeds Rs. 50 and does not exceed Rs. 100	India—Annas eight Bengal, Madras, Punjab, Assam. U. P.—Annas eight	Bombay, C. P., Assam,
Where it exceeds Rs. 100 and does not exceed Rs. 200.	India—Rupee one. one, annas four. Bombay, C. P., Bengal, Punjab, Assam, U. P.—Rupee one.	Madras—Rupee
Where it exceeds Rs. 200 and does not exceed Rs. 300.	India—Rupee one, annas eight. Bombay—Rupees two, annas four. Bengal, Madras, Punjab, Assam— Rupee one, annas fourteen. U. P. —Rupee one, annas ten.	
Where it exceeds Rs. 300 and does not exceed Rs. 400.	India—Rupees two, Bombay—Rupees three, U. P.—Rupees two, annas four. C. P., Madras, Punjab, Berar—Rupees two, annas eight.	

Where it exceeds Rs. 400 and does not exceed Rs. 500.	India—Rupees two, annas eight. Bombay—Rupees three, annas twelve.
Where it exceeds Rs. 500 and does not exceed Rs. 600.	India—Rupees three. Bombay, C. P., Bengal, Madras, Punjab, Assam—Rupees four, annas eight.
Where it exceeds Rs. 600 and does not exceed Rs. 700.	India—Rupees three, annas eight. Bombay, C. P., Bengal, Madras, U. P., Punjab, Assam—Rupees five, annas four.
Where it exceeds Rs. 700 and does not exceed Rs. 800.	India—Rupees four. U. P., Bombay, C. P., Bengal, Madras, Punjab, Assam—Rupees six.
Where it exceeds Rs. 800 and does not exceed Rs. 900.	India—Rupees four, annas eight. Bombay, C. P., Bengal, Madras, Punjab, U. P., Assam—Rupees six, annas twelve.
Where it exceeds Rs. 900 and does not exceed Rs. 1,000	India—Rupees five. Bombay, C. P., Bengal, Madras, Punjab, U. P., Assam—Rupees seven, annas eight.
and for every Rs. 500 or part thereof in excess of Rs. 1,000.	India—Rupees two, annas eight. Bombay, C. P., Bengal, Madras, Punjab, U. P., Assam—Rupees three, annas twelve.

### Agreements or Memorandum of Agreements

Bonds, though in the nature of agreements, are distinguished from agreements for stamp duty purposes. Bonds are defined by Section 2(5) as including—

- (a) Any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ;
- (b) any instrument attested by witnesses and not payable to order or bearer, whereby a person obliges himself to pay money to another ; and
- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

The duty on a bond is chargeable as on pages 363 and 364 under Art. 15.

An agreement is “an act in law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them.” (*Pollock*).

An agreement, however, is chargeable with stamp duty according to Art. 5 as follows :—

- |   |  |
|---|--|
| (a) If relating to the sale of a bill of exchange.  | India—Annas two. Bombay, Punjab, Burma, Bengal—Annas four. C. P., Madras, U. P., Bihar, Berar—Annas three.   |
| (b) If relating to the sale of a Government security or share in an incorporated company or other body corporate. | India—Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof, of the value of the security or share.<br><br>Bombay and Bengal—Subject to a maximum of Rs. 20, two annas for every Rs. 10,000 or part thereof of the value of the security or share.<br>C. P., Madras, Bihar, Berar, U. P.—Subject to a maximum of Rs. 15, one and half anna for every Rs. 10,000 or part thereof of the value of the security or share.<br>Punjab—Subject to a maximum of Rs. 15, two annas for every Rs. 10,000 or part thereof of the value of the security or share. |
| (c) If not otherwise provided for.  | India—Annas eight. Bombay, Bengal, Burma, Punjab—Rupee one. Madras, Bihar, C. P., Berar, U. P.—Annas twelve.   |

### Exemptions

Agreement or memorandum of agreement—

- (a) For or relating to the sale of goods or merchandise exclusively, not being a note or memorandum chargeable under No. 43;
- (b) made in form of tenders to the Government of India for or relating to any loan;
- (c) made under the European Vagrancy Act, 1874, Section 17.

### Shares

Share certificates evidencing the right or title of the holder thereof are chargeable with the duty of two annas.

### Share Warrants

Share warrants are chargeable under Art. 59 as—

- |  |  |
|--|--|
| Share Warrants to bearer issued under the Indian Companies Act, 1882 | India—Bombay, C. P., Bengal, Madras, Punjab, Assam.—One and a half times the duty payable on a conveyance (No. 23) for a consideration equal to the nominal amount of the share specified in the warrants.<br>U. P.—The same duty as a Debenture transferable by Delivery (No. 27-b) for a face amount equal to the nominal amount of the shares specified in the warrant. |
|--|--|



### Exemptions

Share warrant, when issued by a company in pursuance of the Indian Companies Act, 1882 [1913], Sec. 30 to have effect only upon payment, as composition for that duty, to the Collector of Stamp Revenue, of—

(a) one-and-a-half times per centum of the whole subscribed capital of the company; or

(b) if any company which has paid the said duty of composition at full, subsequently issues an addition to its subscribed capital, one-and-a-half per centum of the additional capital so issued.

### Conveyance

Conveyance is chargeable under Art. 23 as

[as defined by Sec 2(10), not being a transfer charged or exempted under No. 62]—

Where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs 50.

Where it exceeds Rs. 50 but does not exceed Rs. 100.

Where it exceeds Rs. 100 but does not exceed Rs 200.

Where it exceeds Rs. 200 but does not exceed Rs. 300.

Where it exceeds Rs. 300 but does not exceed Rs. 400.

Where it exceeds Rs. 400 but does not exceed Rs 500

Where it exceeds Rs. 500 but does not exceed Rs. 600

Where it exceeds Rs. 600 but does not exceed Rs. 700.

Where it exceeds Rs. 700 but does not exceed Rs. 800.

India—Annas eight. Bombay, C. P., U. P.—Annas eight.  
Bengal, Madras, Punjab, Bihar—Annas twelve.

India—Rupee one  
Bengal, Madras, Punjab, Bihar—Rupee one. annas eight.

India—Rupees two. Bombay, C. P., U. P.—Rupees two.  
Bengal, Madras, Punjab, Bihar—Rupees three.

India—Rupees three U. P.—Rupees three, annas four  
Bombay, Bengal, Madras, Punjab, Bihar—Rupees four, annas eight.

India—Rupees four. U. P.—Rupees four, annas eight  
Bombay, Bengal, Madras, Punjab Bihar—Rupees six

India—Rupees five. U. P.—Rupees five, annas twelve.  
Bombay, C. P., Bengal, Madras, Punjab, Bihar, Berar—Rupees seven, annas eight.

India—Rupees six.  
Bombay, C. P., Bengal, Madras, Punjab, Bihar, Berar, U.P.—Rupees nine.

India—Rupees seven.  
Bombay, C. P., Bengal, Madras, Punjab, Bihar, Berar, U. P.—Rupees ten, annas eight.

India—Rupees eight.  
Bombay, C. P., Bengal, Madras, Punjab, U. P., Bihar, Berar—Rupees twelve.

Where it exceeds Rs. 800 but does not exceed Rs. 900.	India—Rupees nine. U. P.—Rupees eleven, annas twelve. Bombay, C. P., Bengal, Madras, Punjab, U. P., Bihar, Berar—Rupees thirteen, annas eight.
Where it exceeds Rs. 900 but does not exceed Rs. 1,000.	India—Rupees ten. Bombay, C. P., Bengal, Madras, Punjab, U. P., Bihar Berar—Rupees fifteen.
and for every Rs. 500 or part thereof in excess of Rs. 1,000.	India—Rupees five. Bombay, C. P., Bengal, Madras, Punjab, U. P., Bihar, Berar—Rupees seven, annas eight.

### Exemptions

(Assignment of copyright by entry made under the Indian Copyright Act, 1847, Sec. 5).

A letter of allotment of shares is chargeable with a stamp duty of two annas.

### Articles of Association

The Articles of Association of a company are chargeable with a stamp duty of twenty-five rupees (Art. 10). The Articles of any Association, not formed for profit, are exempt from stamp duty.

### Award (Art. 12)

#### Award

- (a) Where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000.
- India, Punjab, Bihar, Berar, C. P., U. P.—The same duty as a Bond for such amount.  
Madras—The same duty as a Bottomry Bond for such amount.  
Bombay (a) and (b)—The same duty as a Bond for the amount or value of the property to which the award relates as set forth in such award, subject to a maximum of rupees twenty.
- (b) In any other case.
- India—Rupees five.  
Punjab, Bihar, C. P., U. P., Berar (b)—if it exceeds Rs. 1,000 but does not exceed Rs. 5,000—Rupees seven, annas eight. And for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000—Eight annas, subject to a maximum of rupees fifty.  
Madras (b)—If it exceeds Rs. 1,000 but does not exceed Rs. 5,000—Rupees ten.

And for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000—Eight annas, subject to a maximum of rupees fifty.

Bombay (a) and (b)—The same duty as a Bond for the amount or value of the property to which the award relates as set forth in such award, subject to a maximum of rupees twenty.

### **Definition of Award**

Award, that is to say any decision in writing by an arbitrator or an umpire not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit—

### **Exemption**

Award under the Bombay District Municipal Act, 1873 [1901], Section 81, of the Bombay Hereditary Offices Act. 1874, Section 18.

### **RECEIPT**

A receipt is defined by Section 2(23) as: "Receipt" includes any note, memorandum or writing—

(a) Whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or

(b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt, or

(c) whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged, or

(d) which signifies or imports any such acknowledgment and whether the same is or is not signed with the name of any person.

Where an unstamped receipt has been given in place of a stamped receipt on a document requiring a stamp and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against the persons giving it on payment of a penalty of one rupee by the person tendering it [Sec. 25(b)]. In this case it may be added that the payment of money in the absence of a receipt can be proved by witnesses, because a person making a payment is in no case bound to take a receipt. The person receiving the money is bound to give a receipt, when asked, if the amount exceeds twenty rupees (Sec. 30). If he refuses or neglects to do so with a view to defraud the Government of any duty, he lays himself open to a fine not exceeding one hundred rupees. A receipt for payment without consideration requires no stamp. Also a receipt given by a barrister for his fees requires no stamp (Art. 53), though it has been held in England that it does. A receipt given for money deposited or securities for money deposited in the hands of any banker,

to be accounted for, does not require to be stamped. The copies of the original stamped receipt do not require to be stamped, but duplicate receipts are required to be stamped, as the original. An acknowledgment of money over twenty rupees must also be stamped. The stamp required on a receipt is of one anna.

### **Bill of Lading**

A bill of lading requires to be stamped with a stamp of four annas and if the same is drawn in parts, each part should bear the proper stamp. Bills of lading executed out of British India and relating to property to be delivered in British India are exempt. Also bills of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889 (1908), and are to be delivered at another place within the limits of the same port are exempt [Art. 14 (a) and (b)]. A mate's receipt is not a bill of lading. An endorsement on a bill of lading is exempt from stamp duty.

**Bill of Lading** (including a India—Four annas. Punjab—Eight annas.  
through bill of lading) Bengal, Madras—Six annas.

*N.B.*—If a bill of lading is drawn in parts, the proper stamp must be borne by each one of the set.

### **Exemption**

- (a) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889, and are to be delivered at another place within the limits of the same port.
- (b) Bill of lading when executed out of British India and relating to property to be delivered in British India.

### **Bottomry Bond**

Same duty as in case of a bond of the same value is chargeable (Art. 16).

### **Charter-party**

The stamp duty on a charter-party is one rupee (Art. 20). Bengal, Madras, Punjab, Bombay, Bihar, C. P., Berar and U. P.—Two rupees.

### **Cheque**

A cheque is defined by the Stamp Act to mean "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand" [Sec. 2(7)]. A cheque or an indorsement on a cheque is exempt from stamp duty (Art. 62).

### Debentures

The duty on debentures issued by companies is the same as in the case of bonds, unless they are mortgage debentures, in which case if they are issued in pursuance of a mortgage they shall be exempted from further duty; if not, the stamp duty will have to be paid upon separate debentures. This, of course, applies to limited companies alone and not to proprietors of estates or private individuals issuing debenture bonds. The renewal of debentures with or without certain permissible alterations in their terms is exempt from duty. Debentures issued by a local authority raising a loan are chargeable with duty at the rate of 1 per cent on the total amount of the bonds or debentures (Art. 27).

#### Debentures

(whether a mortgage-debenture or not) being a marketable security transferable—

- (a) by endorsement or by a separate instrument of transfer.
- (b) by delivery

The same duty as a bond for the same amount.

The same duty as a conveyance for a consideration equal to the face-amount of the debenture.

*Explanation.*—The term “debenture” includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty.

### EXEMPTION

A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing makes over, in whole or in part, its property to trustees for the benefit of the debenture-holders provided that the debentures so issued are expressed to be issued in terms of the said mortgage deed.

#### Delivery Order

With regard to delivery orders the following is provided for under Article 28 :—

##### Delivery order in respect of goods

that is to say, any instrument entitling any person therein named, or his assigns or the holder thereof, to the delivery of any goods, lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods upon the sale or transfer of the property therein, when such goods exceed in value twenty rupees.

One anna.

### Khatta

A *khatta* merely acknowledging a debt but which does not include a promise to pay is chargeable with one anna duty only; but if a statement as to interest is included it would be chargeable with duty as if it was an agreement. Article 1 lays down the following rule:—

#### Acknowledgment of a debt

exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt if any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession. Provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property

One anna.

#### Letter of allotment

Letter of allotment of shares in any company or proposed company or in respect of any loan to be raised by any company or proposed company

Two annas.

#### Letter of credit

Letter of credit, that is to say, any instrument by which one person authorises another to give credit to the person in whose favour it is drawn.

Two annas

### Partnership

#### A.—Instrument of

(a) where the capital of the partnership does not exceed Rs. 500

India—Rupees two, annas eight. Bombay Bengal, Madras, C. P., Bihar, Berar—Rupees five.

U. P.—Rupees three, annas twelve.

(b) In any other case.

India—Rupees ten.

Bombay, Bengal, Madras, Bihar, C. P., Berar—Rupees twenty.

U. P.—(1) Where the capital exceeds Rs. 500, but does not exceed Rs. 1,000—Rupees seven, annas eight.

(2) In any other case—Rupees fifteen.

#### B.—Dissolution of.

India—Rupees five.

Bombay, Bengal, Madras, Bihar, C. P., Berar, U. P.—Rupees ten.

With regard to dissolution of partnership. Lindley, in his book on *Partnership*, says:—

"If a retiring partner, instead of assigning his interest, takes the amount due to him from the firm and gives a receipt for the money and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want."

## Policy of Insurance

Section 2 (19) defines the policy of insurance as: "Policy of insurance includes—

(a) any instrument by which one person, in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event;

(b) a life policy, and any policy insuring any person against accident or sickness, and any other personal insurance."

Section 66 lays down the following penalty in case of unstamped policies of insurance:—

"Any person who—

(a) receives, or takes credit for, any premium or consideration for any contract of insurance and does not, within one month after receiving or taking credit for such premium or consideration, make out and execute a duly stamped policy of such insurance; or

(b) makes, executes or delivers out any policy which is not duly stamped, or pays or allows in account, or agrees to pay or allow in account, any money upon, or in respect of, any such policy;

shall be punishable with fine which may extend to two hundred rupees."

With regard to the stamp duty itself Article 47 lays down the following scale:—

## Policy of Insurance

	If drawn singly	If drawn in duplicate, for each part.
<b>A.—Sea Insurance (See Sec. 7)—</b>		
<b>(1) For or upon any voyage—</b>		
(i) Where the premium or consideration does not exceed the rate of two annas or one-eighth per centum of the amount insured by the policy ..	One anna	Half anna
(ii) In any other case, in respect of every full sum of one thousand five hundred rupees and also any fractional part of one thousand five hundred rupees insured by the policy ..	One anna	Half anna
<b>(2) For time—</b>		
(i) In respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy—		
Where the insurance shall be made for any time not exceeding six months ..	Two annas	One anna
Where the insurance shall be made for any time exceeding six months, and not exceeding twelve months ..	Four annas	Two annas

**B.—Fire Insurance—**

- (1) In respect of an original policy—  
 (i) When the sum insured does not exceed rupees five thousand .. Eight annas.  
 (ii) In any other case .. One rupee.  
 (2) In respect of each receipt for any payment of a premium on any renewal of an original policy. One-half of the duty payable in respect of the original policy in addition to the amount, if any, chargeable under No. 53.

**C.—Accident and Sickness Insurance—**

- (a) Against railway accident, valid for single journey only One anna.

**Exemption**

When issued to a passenger travelling by the intermediate or third class in any railway.

- (b) In any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed rupees one thousand and also where such amount exceeds rupees one thousand for every rupees one thousand or part thereof .. Two annas.

**D.—Life insurance or other insurance not specifically provided for, except such re-insurance as is described in Division E of this article—**

- For every sum insured not exceeding rupees one thousand and also for every rupees one thousand or part thereof insured in excess of rupees one thousand  
 (i) If drawn singly .. Six annas.  
 (ii) If drawn in duplicate, for each part .. Three annas.

**Exemption**

Policies of life insurance granted by the Director General of the Post Offices of India in accordance with rules for Postal Life Insurance issued under the authority of the Government of India.

**E.—Reinsurance** by any insurance company, which has granted a policy of Sea insurance or a policy of Fire insurance, with another company by way of indemnity or guarantee against the payment on the original insurance of a certain part of the sum insured thereby .. One-quarter of the duty payable in respect of original insurance but not less than one anna or more than one rupee.

**General Exemption**

Letter of cover or engagement to issue a policy of insurance: Provided that, unless such letter or engagement bears the stamps prescribed by this Act for such policy, nothing shall be claimable there-



under, nor shall it be available for any purpose, except to compel the delivery of policy therein mentioned

### Proxy and Power-of-attorney

Section 2(21) defines a power-of-attorney as :—

“(21) Power-of-attorney includes any instrument (not chargeable with a fee under the law relating to court fees for the time being in force), empowering a specified person to act for and in the name of the person executing it.”

The stamp duty scale on a power-of-attorney is laid down by Article 48 as follows :—

### Proxy

Empowering any person to vote at any one election of the members of a district or local board or of a body of municipal commissioners, or at any one meeting of (a) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable, (b) a local authority, or (c) proprietors, members or contributors to the funds of any institution

.. Two annas.

The use of an unstamped proxy makes the person using or attempting to use same liable to a penalty not exceeding five hundred rupees.

### Power-of-attorney

as defined by Section 2(21) |, not being a proxy (No. 52)

- |   |  |
|---|--|
| (a) When executed for the sole purpose of procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents. | India—Annas eight Bombay, Bengal, Punjab—Rupee one.<br>C P, Madras, Bihar, Berar, U P—Annas twelve.                |
| (b) When required in suits or proceedings under the Presidency Small Causes Courts Act, 1882  | India—Annas eight Madras, Bihar, Berar, C. P., U. P.—Annas twelve.<br>Bombay, Bengal, Punjab—Rupee one.            |
| (c) When authorising one person or more to act in a single transaction other than the case mentioned in clause (a).   | India—Rupee one. Bombay, Punjab, Bengal—Rupees two.<br>C P, Madras, Bihar, U. P., Berar—Rupee one, annas eight.    |
| (d) When authorising not more than five persons to act jointly and severally in more than one transaction or generally.   | India—Rupees five. Bombay, Bengal, Punjab—Rupees ten.<br>C P, Madras, Bihar, Berar, U P—Rupees seven, annas eight. |

- (e) When authorising more than five persons but not more than ten persons to act jointly and severally in more than one transaction or generally. India—Rupees ten. Bombay, Punjab—Rupees twenty.  
C. P., U. P., Madras, Bihar, Berar—Rupees fifteen.
- (f) When given for consideration and authorising the attorney to sell any immovable property India—The same duty as a conveyance for the amount of the consideration.
- (g) In any other case. India—Rupee one for each person authorised.  
Bombay Bengal, Punjab—Rupees two for each person authorised.  
C. P., U. P., Madras, Bihar, Berar—Rupee one, annas eight for each person authorised.

*N.B.* The term "registration" includes every operation incidental to registration under the Indian Registration Act (1908)

### EXPLANATION

For the purpose of this article more persons than one when belonging to the same firm shall be deemed to be one person.

### Promissory Note

- (a) When payable on demand:—  
 (1) When the amount or value does not exceed Rs. 250 . One anna.  
 (2) When the amount or value exceeds Rs. 250, but does not exceed Rs 1,000 Two annas.  
 (3) In any other case Four annas.  
 (b) When payable otherwise than on demand The same duty as a bill of exchange

### "Respondentia Bond

#### Respondentia Bond

Respondentia Bond, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination India—The same duty as a Bond for the amount of the loan secured.  
Bengal, Madras, Punjab—The same duty as a Bottomry Bond for the amount of the loan secured.

## CHAPTER XIX

### MORTGAGES AND CHARGES OF IMMOVABLE AND MOVABLE PROPERTY

THE LAW as to mortgage of immovable property is to be found in the Transfer of Property Act of 1882 which has been considerably amended in 1929.

Section 58 defines the various classes of mortgages as follows :—

(a) A *mortgage* is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called the *mortgagor*, the transferee the *mortgagee*; the principal money and interest of which payment is secured for the time being is called the *mortgage money*, and the instrument (if any) by which the transfer is effected is called the *mortgage deed*.

(b) Where, without delivering possession of the mortgaged property the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a *simple mortgage* and the mortgagee a *simple mortgagee*.

(c) Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an *usufructuary mortgage* and the mortgagee an *usufructuary mortgagee*.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-moneys as agreed, the transaction is called an *English mortgage* (Sec. 58).

The essence of a mortgage is that there should be a transfer for the purpose of securing a debt or other obligation. If the transfer was made for discharging a debt it would not be a mortgage. This

transfer would form a right *in rem* which is available against all subsequent mortgagees or transferees whether they had notice of it or not. A mere covenant given by one party to another in consideration of a loan under which the borrower agrees not to part with some property belonging to him until he repays the principal and interest does not constitute a mortgage. The other requirement is that the property mortgaged must be "specific", i.e. clearly defined and capable of being identified. It may be mentioned, however, that a mortgage of future property, i.e., that which is to come into existence, though not registered by the Transfer of Property Act, is recognised by the Court of Equity as capable of being specifically performed. The principle governing such cases seems to be that until the future property comes into existence the contract remains a mere contract but immediately after that event it becomes a mortgage *ipso facto*. The immovable property referred to does not include standing timber, growing crops or grass (Sec. 3). With this exception it includes "land, benefits to arise out of land, or things as trees and shrubs rooted, or as walls and buildings imbedded in the earth, or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to any thing so rooted, imbedded, or attached : but not standing timber, growing crops or grass".

### Simple Mortgage

In the case of a simple mortgage the mortgagee has two rights, viz. (1) to sue the mortgagor personally on his personal covenant to repay, or (2) to recover the amount from the property itself which is virtually hypothecated with him. Both these remedies may be resorted to at the same time or in succession. Here the "transfer" is said to be of the right of sale. A simple mortgage differs from a 'charge' inasmuch as a charge may not necessarily be given on a specific property but may extend over all the property including movables and it does not involve a 'transfer' which is the essence of a mortgage as governed by this Act.

### Mortgage by Conditional Sale

In the case of a mortgage by conditional sale the possession of the property may or may not be given to the mortgagee. This class of mortgage is distinguished from a mere conditional sale and often difficulties arise in deciding whether the transaction falls under one or the other class. The sense of the document taken as a whole is the general determining standard. Where words as to the repayment of the loan or redemption of the property are used, it would be construed as a mortgage by conditional sale.

**Usufructuary Mortgage**

This is a form of mortgage in which the repayment of loan begins as soon as the mortgage is effected. Here possession is given at once to the mortgagee who is to recover his loan and interest from the rents and profits accruing. This possession may be for a specific period during which the whole loan, or a specific portion of it, may, by special agreement, be taken to have been liquidated. In the case of an usufructuary mortgage the mortgagee has no right to sue for a foreclosure or sale. The mortgagor here is not personally liable to repay the loan but the mortgagee is expected to look to the rents and profits to recoup his advance and interest.

**English Mortgage**

In an English mortgage the possession of the property generally remains with the mortgagor, whereas the real legal estate in the property passes to the mortgagee. The condition here is that on payment of the money *plus* interest the mortgaged property will be re-conveyed by the mortgagee to the mortgagor. If there is no express condition in an English mortgage as to a certain time for which the possession is to remain with the mortgagor then the mortgagor becomes a mere tenant at sufferance and is liable to be ejected by the mortgagee without any claim as to rent or interest due. English mortgages are most common in presidency towns and the courts in such towns have accorded to the parties the same rights as in English law.

**Form of the Instrument**

Where the principal money secured is Rs. 100 or upwards a mortgage of immovable property can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than Rs. 100 the mortgage can be effected either by a registered instrument, signed and attested as aforesaid as (except in the case of a simple mortgage) by delivery of the property. This rule does not affect mortgages made in the towns of Calcutta, Madras, Karachi, Rangoon, Bombay, Moulmein, Bassein and Akyah by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon (Sec. 59). If the instrument is not registered it fails as a mortgage and is inadmissible in evidence to prove a mortgage, but it may be made use of for any other purpose for which registration is not necessary; e.g. for proving a simple personal debt. It may also be noted that in the absence of an express agreement the cost of stamping a mortgage and the cost of reconveyance has to be borne by the mortgagor.

**Equitable Mortgage**

The amended Act of 1929 further provides that in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and

Akyab, and any other town which the Governor-General by notification may specify, a mortgage by deposit of title deeds may be effected by a person handing over to a creditor or his agent documents of title to immovable property with intent to create a security thereon.

This is what in English law is termed an equitable mortgage, but our Indian Act gives it a very limited import. In English law, for instance, a lien is also regarded as a species of an equitable mortgage and generally a much wider meaning is given to this term than that provided for by our Indian Act. Thus what is required in India in order to create an equitable mortgage is (1) a debt, (2) deposit of title deeds, and, (3) intention to create a mortgage.

## **RIGHTS AND LIABILITIES OF MORTGAGOR**

### **Redemption**

At any time after the principal money has become due, the mortgagor has a right on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee and at the cost of the mortgagor either to re-transfer the mortgaged property to him, or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished: **Provided** that the right conferred by this section has not been extinguished, by act of the parties or by decree of a court. The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption. Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for the payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money (Sec. 60).

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one all such mortgagees has or have acquired in whole or in part, the share of the mortgagor (Sec. 60).

The right of redemption is one of which the mortgagor cannot be deprived by an agreement to the contrary because no clause in the mortgage agreement which impedes or prevents redemption would be allowed by the court on the grounds of its being oppressive and unreasonable. In other words, there can be no clog on the equity of redemption. The other point to be noted is that a mortgagor can claim to redeem only when

the money becomes payable and due and cannot insist on redeeming before that date. If, however, there is an agreement that the mortgagor can, before the money becomes due, redeem on payment of the mortgage money with interest, he can do so. On redemption the mortgagor would be entitled to the return of the mortgage deed and the return of the mortgaged land if the possession of it is with the mortgagee. He can also get the land re-transferred to himself, or get an acknowledgment to the effect that no right in derogation of the interest transferred under the mortgage exists any longer. If two separate properties are mortgaged under separate mortgages to the same mortgagee, the mortgagor seeking to redeem any one of these shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under the separate mortgage (Sec. 61).

### **Recovery of Possession**

In the case of an usufructuary mortgage, the mortgagor has a right to recover possession of the property—

(a) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property—when such money is paid ;

(b) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in court as hereinafter provided (Sec. 62)

### **Accession to the Property**

If the mortgaged property in the possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary,

be set off against interest, if any, payable on the money so expended (Sec. 63).

If, for example, A mortgages to B a certain field bordering on a river, the field is increased by alluvion, that would be an accession! Crops are not included in the term "accession" as used in this section.

Where the mortgaged property is a lease for a term of years and the mortgagee obtains a renewal of the lease the mortgagor upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease (Sec. 64).

The right of the mortgagor to claim to be entitled to the renewed lease is independent of special circumstances. He can be deprived of the right by a special agreement to the contrary. The right of the mortgagor is an absolute right as compared with the qualified right he may acquire in the case of subordinate tenures acquired by the mortgagee with respect to the mortgaged property.

### Implied Contracts by the Mortgagor

In the absence of a contract to the contrary the mortgagor shall be deemed to contract with the mortgagee—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;
- (c) that the mortgagor will, so long as the mortgagor is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;
- (e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance



The benefit of the contracts mentioned in this Section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time vested (Sec. 65).

If any of these implied contracts are broken the mortgagee can take advantage of Section 68 and institute a suit for the recovery of the mortgaged property. Where the mortgagor fails to pay the public charges as required by sub-section (c) the mortgagee can pay them and add the amount to his charge.

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act (Sec. 66).

What this Section means is that the mortgagor in possession is not responsible for what is known as "permissive waste". He is, of course, at liberty to recover rents and profits from the property as long as he is in possession and is not bound to account for them. The mortgagor, however, is not allowed a waste of a more or less active nature which reduces the value of the security such as the removal of valuable fixtures or the cutting down of timber. If he does so and the value of the security is lowered he may be called upon to furnish further security or to repay the mortgage-money, particularly when the security has become insufficient. With the exception of usufructuary mortgages, the mortgagor can leave the property in the regular course of management, but this is, of course, subject to the qualification that no lease, with exceptionally favourable conditions and particularly for a very long period in return for a premium or a lump sum, can be given without the concurrence of the mortgagee.

### **RIGHTS AND LIABILITIES OF THE MORTGAGEE**

The rights of the mortgagee fall under one or more of the following :—

- (1) The right to foreclosure or sale. This right is now restricted by the Amending Transfer of Property Act, 1929, to only mortgages by conditional sale and anomalous mortgage.
- (2) The right to sue for mortgage-money.
- (3) In case of a subsequent mortgage the right of the subsequent mortgagee to pay off the prior mortgage.

#### **(1) Foreclosure**

With regard to the first, Section 67 lays down as follows :—

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as herein-

after provided, a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this Section shall be deemed—

(a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for sale of the property, to institute a suit for foreclosure; or

(c) to authorise the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorise a person interested in part duly of the mortgage-money to institute a suit relating to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, served their interests under the mortgage.

### **Mortgagee holding several Mortgages**

The Act compels him to sue on all mortgages of the same kind at one and the same time. The Section 67 (a) runs as follows :—

A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has the right to obtain the same kind of decree under Section 67, and who sues to obtain such decree on any one of the mortgages, shall in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due.

### **(2) Right to Sue for Mortgage-Money**

With the amendment of the new Act of 1929, Section 68 reads as follows :—

(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—

(a) where the mortgagor binds himself to repay the same ;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 88, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

(d) where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceeding therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

The above section applies only to mortgages and not to a charge.

### Sale Without Intervention

In this connection Section 69 of the Original Transfer of Property Act of 1882 has been considerably amended by the Amending Act of 1929 as there were numerous conflicts of decisions in this connection, that is, regarding the mortgagee's power to sell the mortgagor's property without the intervention of the court. Of course, under the English law this power is looked upon as an incident of all mortgages, but in India, it has always been felt that a power of this kind should not be given to mofussil mortgagees without mischief being the result. The amended Section therefore places a check on any such abuse in the future. The Section lays down that notwithstanding anything contained in the Trustees and Mortgagees Powers Act, 1866, a mortgagee or any person acting on his behalf shall have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money without the intervention of the court in the following cases and in no others, namely:—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mahomedan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council in the local official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Secretary of State for India in Council;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgaged property or any part thereof was on the date of the execution of the mortgage-deed, situate within the town of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town or area which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf.

This power should be exercised only after a certain formality has been observed as laid down by the section, namely that notice in writing requiring payment of the mortgage-money has been served on

the mortgagor concerned, and he has made a default in payment, or that interest amounting to at least Rs. 500 is in arrears for three months after it was due. When these requirements are answered, the sale is made in exercise of the power and the money received by the mortgagee is to be utilised for the discharge of prior incumbrances if any after paying the costs, charges and expenses incurred in connection with the sale and the balance should be utilised for the discharge of the mortgage money and costs due under the mortgage, and the residue of the money so received is to be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale. As regards interest, it will be noted that if there is a provision in the mortgage-deed to the effect that the power of sale is not to be exercised unless the principal sum is also due and not paid, the power to sell cannot be exercised only in connection with the interest due. Of course, it is the duty of the mortgagee to see that he sells the property at the best price and deals with the property under such conditions, as an owner would of his own property. With regard to the surplus money as well as the money due to the subsequent encumbrancers, the selling mortgagee is in the position of a trustee for the person entitled to the money. (*Pichu v. Vadhiar Secretary of State*, 40 Mad. 767.)

The present amendment goes further and by an additional section, namely Section 69A, gives the mortgagee title to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property. This receiver can be removed by the said mortgagee by a similar writing signed by or on behalf of the mortgagee and the mortgagor, and the receiver so appointed shall be deemed to be the agent of the mortgagor unless the mortgage-deed otherwise provides. Once the receiver is appointed, he shall have power to demand and recover all the income either by suit, execution or otherwise in the name either of the mortgagor or the mortgagee and give valid receipts. The receiver is entitled to retain out of such money his remuneration, costs, charges and expenses incurred by him, the said remuneration not to exceed 5 per cent on the gross amount of all money received. If no specific remuneration is provided for, he will be entitled to 5 per cent.

### (3) SUBSEQUENT MORTGAGEE OR SUBROGATION

The old section only dealt with the right of a subsequent mortgagee to pay off a prior mortgagee, but now instead of this old Section 72, a new Section 92 has been inserted, under which over and above the subsequent mortgagee redeeming a prior mortgagee, a provision is made by which any person interested in the discharge of an incumbrance is given power to discharge it and to be subrogated in the place of the one whom he has paid off, i.e. he is entitled to all the remedies to which the person who was paid off

had recourse. The section thus lays down that any person so interested, such as the subsequent mortgagee or even a co-mortgagor, may redeem and step into the place of the person redeemed. Of course, the redemption has to be in full, in order to get this right of subrogation.

### MORTGAGEE IN POSSESSION

A mortgagee who takes possession of the mortgaged property must manage the property as a person of ordinary prudence would manage it if it were his own. He must do his best to collect rent and profits, and in the absence of a contract to the contrary, pay the Government revenue and all other charges of a public nature due on the property during such possession, as well as arrears and all rent in default of the payment of which the property may be summarily sold. He must also, unless otherwise provided for, make necessary repairs to the property from such rents and profits that may be left after paying the charges as above mentioned. He must not commit any act which is likely to be injurious to the property, and where he has insured the whole or any part of it against loss or damage by fire he must, in the case of such loss or damage, apply the money received by him under the policy in the first instance, to the reinstating of the property, or if the mortgagor so directs, in reduction or discharge of the mortgage-money. He is bound to keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and during the continuance of the mortgage give the mortgagor copies of such accounts if requested to do so, charging the cost of such copies to the mortgagor. He would also be charged a fair occupation rent in respect of the premises in his possession in case he occupies the whole or part of them, and the balance of the receipts in favour of the mortgagor would be debited against him in reduction of the money due to him from time to time on account of interest on the mortgage-money, and in case such receipts exceed the amount of interest, it would be debited to him in discharge of the mortgage-money itself. The surplus, if any, is to be paid to the mortgagor. Failure to perform any of the duties imposed upon him renders the mortgagee liable to be debited with the loss, if any, occasioned by such failure (Sec. 76).

With regard to the right of the mortgagee in possession during the continuance of the mortgage, to spend his own money and to add it to the principal money, Section 72 lays down as follows:—

- (1) for the preservation of the mortgaged property from destruction, forfeiture or sale;
- (2) for supporting the mortgagor's title to the property;
- (3) for making his own title thereto good against the mortgagor; and
- (4) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent per annum:

Provided that the expenditure of money by the mortgagee under clause (1) or clause (2) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is, by its nature, insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or where no such rate is fixed, at the rate of 9 per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage deed, or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction, to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure (Sec. 72).

It may be added here that the management, as contemplated by this section, means one through the appointment of an agent, because the mortgagee himself cannot charge for his personal labour in that direction. For the preservation from destruction of the property the mortgagee is, of course, bound to spend money, out of rents and receipts, as we have seen above, but over and above that, he may, if he likes, spend money out of his own pocket for necessary repairs to be made, but if buildings become ruinous so as to be unfit for use, "he may complete or pull them down for rebuilding and the rebuilding or repairing may be done in an improved manner and more substantial than before". He may also, in order to avoid forfeiture or sale, pay in discharge of arrears of rent or Government dues and add them to the capital amount due to him.

## MORTGAGE OF MOVABLE PROPERTY

In India, the mortgage of chattels, having the effect of immediately transferring the property thereunder from the mortgagor to the mortgagee, can be made by mere parole and without the transfer of possession. (*Tehilram Girdharidas v. Longin D'Mello*, 8 Bom. L.R. 587.) It will thus be seen that the mortgage of movable property can be made in India without a writing or a transfer of possession, and thus forms a very simple transaction unattended by the various legal formalities so familiar to the mortgage of immovable property. The law as to the mortgage of movable property has been exhaustively dealt with by Beaman, J., in the above case, and the following passage

from the judgment of His Lordship may be quoted here with advantage :—

"We may take it on the authority of all the text-book writers that a mortgage of movables can be as validly effected by parole as by a writing, and that the immediate effect of such a mortgage is to pass the property in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual possession of the chattel should be given. Thus, unlike a mortgage of immovable property, which, no matter what its value, can only be effected in this country by a writing or transfer of possession, mortgages of chattels, having the effect of immediately transferring the property thereunder from the mortgagors to the mortgagees, can be made by mere parole and without the transfer of possession. It is only necessary to dwell for a moment upon this, in particular relation to the known conditions of life in India, to realise how heavily weighted such a doctrine must be with the gravest potentialities of mischief. I can hardly imagine any other legal doctrine that might be more mischievous or open a wider door to fraud and interminable litigation. There is no possibility so far as I can see, of drawing any distinction between the so-called mortgages of movables made by a few spoken words, unaccompanied by possession, and the like mortgages made by the most correct and official documents, accompanied by possession. The only possible justification which occurs to me for having accepted and enforced the principle of the mortgage of chattels in this country lies in the need of considerable traders. Very true, in times of pressure and difficulty a trader may need large advances on the security of his stock-in-trade, and that security might be withheld if the stock-in-trade, whatever it might be at the time the payment was called for, could not be made primarily liable. Obviously, too, the creditor could not take more than symbolical possession of the stock-in-trade without defeating the very object of the loan. So that in case of that kind there might be a reason for permitting the hypothecation of movables on a large scale by the execution of properly drawn formal documents duly registered. But as the doctrine has been imported in its entirety from England, its application in this country must be regarded as co-extensive with its application in England before a plentiful crop of abuse had necessitated the passing of the Bills of Sale Acts. And in England it was quite enough for any one borrowing to hypothecate orally anything and everything of which he might then be or in future become possessed as security for the loan. In such cases where possession is not taken, it is very easy to see practical difficulties of the most serious kind and put cases in which the results must be anything but equitable. Take the following two very simple illustrations of what is at the present moment passing through my mind. A being in need of money and possessing a gold watch goes out into the streets and successively mortgages it to B, C, D, and E in each case for £5, the four transactions all occurring on the same day. Now what are the resultant rights of the mortgagees B, C, D and E? In England the text-book writers at any rate have gone the length of saying that once a mortgage of chattels is created, all the subsequent dealings are to be treated on the same footing and governed by the same principles as the like subsequent dealings in relation to a mortgage proper. But analysis shows that that can hardly be the case where chattels are made the subject of what is called a mortgage immediately transferring the legal estate, because we come at once in conflict with the principle to which expression is given in Sections 169 and 178 of the Indian Contract Act. The mortgage of chattels,

whether by parole or by writing, instantly transfers the property in the goods from the mortgagor to the mortgagee, that is to say, immediately on the payment of the price, or loan or mortgage advance. But let this regarded from whatever point of view be chosen, it works out to this and nothing else, that every hypothecation of that sort is an out-and-out sale subject to a condition that the vendee will resell the chattel to the vendor at a certain price and upon certain conditions. But if it be an out-and-out sale then, in the case supposed, the chattel mortgaged remains in the possession of the vendor with the consent of the vendee and each subsequent oral mortgage becomes a sale in turn. In the case supposed, there could be no possibility of such circumstances existing as would put the second, third and fourth mortgagees, respectively, upon guard, while the possession of the vendor would in each case be with the consent of the true owner. So that as far as I can see in law the last mortgagee would be the only owner of the watch and the three prior mortgagees would have no claim upon it whatsoever. Or upon another view the first mortgagee might have the better claim and the others none. It could hardly be said that like the puisne mortgagees of real estate each had no more than a right to the equity of redemption. For that altogether ignores the very salutary and necessary principle of Section 178 of the Indian Contract Act regulating what actually occurs when these mortgages of chattels are effected. The subject is doubtless confused by substituting the word "mortgage" with all its legal associations for the word 'sale'. But slurring over difficulties by the use of this or that word or the application of special terminology to the matter in hand is but too shallow a way of dealing with what is really going to the root of the principle. And the second illustration I give is that of a trader in active business to whom A lends, let us say, £1,000 on the general faith of his solvency, as exhibited by his possessions and more particularly by his stock-in-trade. Ten days later B advances the same trader £1,000 upon an oral mortgage of every stick and chattel of which he is then or may be in future possessed. And later the trader becomes bankrupt or A takes out execution against him. Adopting the Law of Mortgage of Chattels, it is obvious that in both cases B will be the secured creditor with all preferential rights over A if in the former he has demanded the possession a day before the bankruptcy, though I am entirely at a loss to see what superior equity he has. It may be argued that A has been lending money upon the faith of reputed chattel possessions and takes his risk of their disappearing before he seeks repayment. That is undoubtedly true. On the other hand, apart from the doctrine of the mortgage of movables and assuming that the possessions (chattels) upon which the money is really, though not in so many words stated to be, lent in specie at the time the loan falls due, and supposing there is no question of preference, it is obvious that a creditor's remedy is exactly the same at Law whether there be or be not any hypothecation, that is to say, in any money decree a creditor may attach and sell any or all the property of his judgment-debtor. It thus becomes clear that it is only for the purposes of preference that there is the least need for this hypothecation of movables. And, then, again it could only be in cases where they, or, at any rate, a part of them or substitutes in Law their equivalent, exist in specie at the time the question of priority arises, that the hypothecation can be of value to the mortgagee. So that it really comes to this, that quite apart from any true equity, the creditor, who has been wise enough to stipulate in so many words that the money he advances is advanced on every



chattel which the borrower may then or thenceforward possess, is to have preference on that account over equally *bona fide* lenders, unaware of the oral contract, who have not been far-sighted enough to make such a contract of their own at the time of the advance; and it certainly appears to me that here we are faced with a very real difficulty, and with a doctrine of law, which, carried out logically, would certainly do more injustice than justice. For a man in a seemingly good way of business might go on for years borrowing money from creditors lending in good faith upon his apparent prosperity, while in fact everything movable belonging to him may have been hypothecated orally to some other and earlier creditor, and so upon a case of preference arising, all later creditors would be unable to recover any part of their money, or in the event of each of them in turn having stipulated for the like hypothecation of all the debtor's movables, a problem would arise, as I have already indicated, of which I do not believe any logical solution is possible.

"I have felt it necessary to indicate, indeed, within the compass of a judgment I can do little more than indicate, some points and lines of reasoning, which being thoroughly exhausted and followed up, have convinced me that it is eminently desirable that the law of hypothecation or mortgage of movables is in need of radical reform. This law, it is to be observed, has been transferred bodily from England to India as part of the old common law, and must, therefore, be administered here as it was in England before public policy required its correction and curtailment by the various Bills of Sale Acts. There are no such Acts in this country, and, in my opinion, we should be much better without them, provided that it was legislatively enacted that no Court should recognize any mortgages of movables for a less sum than, Rs. 5,000, unless evidenced by a registered writing. That would suffice to meet the legitimate exigencies of trade; and smaller loans upon the hypothecation of chattels, especial or general, should, I think, be ignored unless they fulfil all the requirements of a pledge. In this country we have a very precise and easily administered law of pledge. Where money is really advanced upon a chattel and the property in that chattel thereupon passes to the creditor it is only right that he should take possession of it and so prevent other people lending money to his debtor on the faith of his being the ostensible owner of goods which really do not belong to him."

## CHAPTER XX

# TRADE MARKS, DESIGNS, PATENTS AND COPYRIGHTS

## TRADE MARKS AND DESIGNS

In the old days under the common law a person who used a Trade Mark had to prove that it was infringed, and that he was the exclusive prior user of it. This was not easy to do and resulted in expensive as well as vexatious litigation. The object of the Trade Mark was that the trader concerned naturally wished to distinguish his goods from those of his rivals, either on account of manufacture or selection, so that some other competitor might not pass off his goods for that of the trader. [*In re Australian Wine Importers*, (1889) 41 Ch. 278.]

### Definition of a Trade Mark

The English Trade Mark Act defines a trade mark as :

"A mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such a trade mark by virtue of manufacture, selection, certification dealing with or offering for sale" [S. 3 (1905) (5 Edw. 7c. 15)].

In India, however, after an amount of delay due to conflicting opinion, with the advance of trade an enactment was ultimately taken in hand which is now known as the "Trade Marks Act of 1940" which extends to the whole of British India. This Act gives a definition of a Trade Mark which runs as follows :—

"Trade Mark" means a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person [S. 2(1)].

It will thus be seen that a trade mark may be made up of any device, brand, heading, label, ticket, or name. Even a signature may be used as a trade mark as is actually done in the business world. Besides that, any word, letter or numeral, or combination of numerals or words or letters, may be used as a trade mark.

### Registration of a Trade Mark

The Trade Marks Act of India, 1940, provides that there shall be established at the Patent Office a Trade Mark Registry and

Record called the "Register of Trade Marks" in which shall be entered all "registered trade marks". In this case the names, addresses and descriptions of the proprietors of the trade marks as well as when they are assigned or transferred, the notices of transfer, shall be registered with the names, and addresses of the transferees, descriptions of registered users, disclaimers, conditions, and limitations, etc. relating to trade marks, as are prescribed by the Act [S. 4(1)].

This register is to be kept under the control and management of the Controller of Patents and Designs who shall be called the Registrar of Trade Marks for the purposes of the Trade Marks Act. This register must be open at all convenient times to the inspection of the public subject to conditions and restrictions as may be prescribed. All questions arising as to the class within which any goods shall fall, will be determined by the Registrar whose decision in this matter is final.

For the purposes of registration the following information must be supplied :—

(a) the name of a company, individual, or firm, represented in a special or particular manner ;

(b) the signature of the applicant for registration or some predecessor in his business ;

(c) one or more invented words ;

(d) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or surname or the name of a sect, caste or tribe in India ;

(e) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness [S. 6 (1)].

With reference to the word 'distinctive' as used in Sub-clause (e) above, it means that the proprietor who proposes to register with a view to distinguish his own goods from other goods of the same denomination, should select a trade mark which is inherently adapted to distinguish his goods through the use of it in business, i.e. it is in fact distinguishable and is adapted to distinguish. The Registrar has to be satisfied on this point before he will accept the trade mark for registration. Thus it will be noticed that under the new Trade Marks Act, a mark cannot be registered unless it is distinctive. However, in the case of old marks which do not fully answer the requirements of the Act as to being distinctive, but have been used as such before the passing of the Act, the 'Act' makes a concession and provides that where it is proved to the satisfaction of the Registrar that the trade mark was used by the applicant before the 25th day of February, 1937, and has been continuously used as such to the date of the application, the Registrar shall not, by reason only of the fact that the trade mark was not distinctive, refuse

registration (S. 6). If an invented word is to be registered as such it must be one which has been new on the date of registration or was so when used by the applicant and has been so used ever since to denote only his goods before the date of registration. All that is wanted is that it must be original more or less from the general stand point. Surnames may be registered provided distinctness is established as the Registrar will scrutinize them closely before accepting them. Of course a trade mark or any part of it which consists of a scandalous design will not be registered and any mark which is likely to deceive or to cause confusion or is contrary to any law or to morality, is prohibited from being registered (S. 8).

In order to avoid confusion, a word which is commonly used and accepted as the name of any single chemical element or single chemical compound or single compound, will be registered (S. 9). Where the Registrar is satisfied that there has been an honest concurrent use of the same trade mark by more than one proprietor or other special circumstances, the Registrar may register it with such conditions and limitations as he may think fit to impose (S. 10). If, however, two separate applications for the registration are presented, of trade marks which are identical or resemble each other and are connected with the same goods or description of goods, the Registrar may refuse to register them until the rights of the parties concerned are determined by a competent court of law (S. 10).

### **Associated Trade Marks**

Associated trade marks are registered where several marks are claimed by one individual in respect of the same goods or description of goods. If the proprietor of a trade mark claims to be entitled to the exclusive use not only of his trade mark, but also of a part thereof separate, as a distinct trade mark, he may do so and get both these, i.e. the original trade mark and the separate part, registered as separate associated trade marks (S. 11).

### **Application for Registration**

The application for registration has to be made in a special form with the print of each mark and if the Registrar refuses to accept or accepts conditionally, the applicant may request him to give his reasons and grounds of decision in writing (S. 14).

Where the Registrar accepts the application he shall as soon as may be possible after acceptance, declare the application accepted stating the condition, if any, imposed thereon. Where the application is opposed, the Registrar must fix a date for the hearing and the decision of the Registrar is appealable under Section 76 of the Trade Marks Act within the period prescribed by the Central Government, provided such suit is pending before the High Court or any court

having jurisdiction to hear this appeal. In this appeal the Registrar shall not, without the express permission of the Court, advance grounds while opposing the appeal, other than those recorded in his decision or advanced by the party in the proceedings before the Registrar. The Registrar, if he so desires, may cause the application to be advertised before acceptance particularly where it appears to him that it is expedient by reason of some exceptional circumstances to do so. Any person who wants to oppose the application for exclusive use of a trade mark may do so within the prescribed time from the date of this advertisement by giving notice in writing, copy of which notice to be furnished by the Registrar to the applicant. Where the applicant sends any counterstatement a copy must be furnished to the person applying for registration. If a counterstatement is sent by the opposition a copy of it must be furnished to the other side. The Registrar then decides as to whether registration should be given or not.

### Certificate of Registration

When the application for registration is accepted, the Registrar shall register the said trade mark and thereafter issue to the applicant a certificate in the prescribed form of the registration of the said trade mark which certificate shall bear the seal of the Patent Office (S. 16).

### Effect of Registration

The effect of registration is that the person so registering a trade mark gets an exclusive right to the use of the trade mark accepted in relation to goods mentioned in the registration. This right to the exclusive use of a registered trade mark will be deemed to be infringed if any one other than the proprietor uses it without the permission of the proprietor or uses a trade mark so identical with or so resembling the registered trade mark as to be likely to deceive or cause confusion in the course of trade in respect of any goods for which it is registered. A person will not be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark. The only exception made here by the Act is in the case of trade marks which have been in continuous use before the 25th day of February, 1937, by such person or his predecessor in title unless this person has applied for the registration of his old trade mark and has been refused (S. 20). It must, however, be noticed that no registration of a trade mark shall interfere with any *bona fide* use by any person of his own name or that of the place of business or of the name of the place of business of any of his predecessors or the use by any person of any *bona fide* description of the character or quality of his goods (S. 26).

The registration of a trade mark is *prima facie* evidence of its validity which becomes conclusive for seven years from the date of the original registration (S. 23).

This is because registration of a trade mark has to be for a period of seven years, but may be renewed from time to time in accordance with the provisions of Section 18 of the Act.

### Rectification and Correction of the Register

Rectification and correction of the register may be made either on the application of the registered proprietor of the trade mark or by any person who claims to be aggrieved. The proprietor of a trade mark may apply for rectification for any of the following purposes, viz. to :—

- (a) correct any error in the name, address or description of the registered proprietor of a trade mark ;
- (b) enter any change in the name, address or description of the person who is registered as proprietor of a trade mark ;
- (c) cancel the entry of a trade mark on the register ;
- (d) strike out any goods or classes of goods from those in respect of which a trade mark is registered ;
- (e) enter a disclaimer or memorandum relating to a trade mark which does not in any way extend the rights given by the existing registration of the trade mark (S. 47).

Where an application is made by an outsider, it has to be presented in the prescribed manner to the High Court or to the Registrar and the Tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of contravention or failure to observe a condition entered on the register. After hearing both sides the Court or the Registrar may make such order for making, expunging or varying the entry as the case may (S. 46).

### Constant User Necessary

The trade mark which is registered is expected by law to be constantly used. If a trade mark is registered without any *bona fide* intention on the part of the applicant to use it in relation to those goods, or if for five years or longer, prior to the period of application, the trade mark, though registered, was not used in relation to the goods concerned, it is likely to be taken off the register.

### Assignment of Trade Marks

The proprietor of a trade mark has a right to assign it subject to the provisions of the Trade Marks Act to any other person and to give effectual receipts for any consideration for such assignment. This consideration may or may not be in connection with the goodwill of a business or in respect of the goods for which it is registered or some of such goods (S. 29).

The assignee must within six months from the last assignment apply to the Registrar for his directions as regards advertisements, etc. where such assignment is without the goodwill (S. 33).

The Registrar must, on the application of the assignee register him as the proprietor after the Registrar is satisfied on proofs produced as to the title of the assignment.

### **Assignment of Unregistered Trade Marks**

Unregistered trade marks are assignable and transmissible whether in connection with the goodwill of a business or not.

Provided that, except in connection with the goodwill of a business, assignment or transmission shall be permissible only, if—

(a) at the time of assignment or transmission of the unregistered trade mark it is used in the same business as a registered trade mark, and

(b) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark, and

(c) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted (S. 30)

### **Special Provisions for Textile Goods**

Special provisions are made by the Act in the case of textile goods. An office has been established in Bombay for facilitating their registration under an Officer, called the Deputy Registrar (S. 63).

In this Office or rather Branch Office, as the Act calls it, a record of all entries in the register relating to trade marks with regard to textile goods has to be kept which record shall be open to inspection for the public, subject of course to conditions that may be prescribed. Trade marks, in respect of textile goods, of which registration has been refused, are to be entered in a list called the Refused Textile Marks List, a copy of which shall be kept at the said branch (S. 63).

The following restrictions are provided for in connection with the registration of *textile goods*.—

(a) no mark consisting of a line heading alone shall be registrable as a trade mark;

(b) a line heading shall not be deemed to be adapted to distinguish;

(c) the registration of a trade mark shall not give any exclusive right to the use of a line heading,

(d) the registration of letters or numerals, or any combination thereof, shall be subject to such conditions and restrictions as may be prescribed (S. 64).

### **Offences under the Trade Marks Act**

The Trade Marks Act provides for punishment or penalty for—

(i) Where a person falsely represents a mark to be registered as a registered trade mark; or

(ii) where he falsely represents a part of a trade mark to be separately registered as a trade mark; or

- (iii) where he falsely represents that a registered trade mark is registered in respect of any goods not registered ; or
- (iv) he falsely represents to the effect that the registration of a trade mark gives an exclusive right to the use thereof where having regard to limitations on the register, does not give that right (S. 68).

The Trade Marks Act provides for punishment for false representation, which may extend to six months' imprisonment or with fine which may extend to Rs. 500 or with both.

In cases of Royal Arms and State Emblems, used by a person without authority, where it leads people to believe that he is duly authorized, any other person who is authorized to use such Arms or Emblems, or the Registrar may sue and restrain him by injunction from continuing to use the same (S. 69).

### **PATENTS AND DESIGNS**

The exclusive rights which an inventor obtains in connection with his inventions for a certain period are regulated in India by the Indian Patents and Designs Act of 1911 as amended in 1920, 1930 and 1936 respectively. This Indian Patents and Designs Act of 1911 has adapted mostly the scheme of the English Patents and Designs Act of 1907 and the later amendments, more or less, correspond to the modification of the English Act in 1919 and 1932.

#### **What is a Patent ?**

The Patent Right is virtually speaking the grant of a monopoly in respect of an invention by the Crown or the Government. In the old days, the Kings of England gave these monopolies. Later, certain restrictions were placed by the Statute of Monopolies 1623 by creating a control on the free and unrestricted right of the Crown to give monopolies. The word "Patent" came into use and was derived from the fact that the form in which the patent right was granted was known in Latin as *Litterae Patentes*, i.e. open letters which were addressed "to all to whom it may concern". The English Law is to be found in the Acts of 1907, 1914, 1919, 1920 and 1932 but as the later acts are more or less amendments of the main Act of 1907, the consolidated Acts of England are now cited as the "Patents and Designs Acts, 1907 to 1932".

#### **Application for a Grant of Patent**

An application for the grant of a patent must be made in the prescribed form, to the Patent Office and the said application should declare that the applicant, or where there is a joint application of more than one, at least one of the applicants, was the true and first inventor or the legal representative or assign of such inventor and for which invention he desires to obtain a patent. The application



must be accompanied by a specification of the invention. This specification is to describe the nature of the invention and the manner in which it is to be performed and where desired by the Controller a drawing of the invention has to be prepared and submitted. The Controller may even, where he thinks desirable, ask for a model or sample of anything illustrating the invention (S. 4).

### Opposition to Grant of Patent

Any person on payment of a certain fee may at any time within four months from the date of the advertisement of the acceptance of the application give notice to the Patent Office of the opposition to the grant of the patent. This opposition may be on any of the following grounds :—

- (a) that the applicant obtained the invention from him, or from a person of whom he is the legal representative or assignee ; or
- (b) that the invention has been claimed in any specification filed in British India which is or will be of prior date to the patent, the grant of which is opposed ; or
- (c) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the specification ; or
- (d) that the invention has been publicly used in any part of British India ; or has been made publicly known in any part of British India ;

but on no other ground (S. 9).

As regards the original application, the Controller must refer the matter to the Examiner as soon as he receives an application and if satisfied on the report of the said Examiner on any of the following subjects he may refuse to accept the application or ask for further specifications in an amended form under the following circumstances :—

- (a) the nature of the invention is not fairly described, or
- (b) the application, specification and drawings have not been prepared in the prescribed manner, or
- (c) the title (of the specification) does not sufficiently indicate the subject-matter of the invention, or
- (d) the statement of claim does not sufficiently define the invention, or
- (e) the invention as described and claimed is *prima facie* not a (a manner of) new manufacture or improvement, or
- (f) the specification relates to more than one invention, or
- (g) in the case of an application claiming priority under Section 78A, the specification describes and claims an invention substantially larger than or substantially different from the invention disclosed in the specification filed with the application made outside British India by virtue of which priority is claimed, or

- (h) in the case of an application for a patent of addition under Section 15A, the invention described and claimed in the specification is not an improvement or modification of that described and claimed in the original specification (S. 5).

In a case of the refusal of the Controller to accept the application there is a right of appeal from his decision. It may be further noted that unless an application is accepted within twelve months from its date the application will be deemed to have been refused unless an appeal has been lodged [S. 5(4)].

Where the application is accepted an advertisement must be given by the Controller of his acceptance keeping the specifications and drawings, if any, open for public inspection (S. 6).

After the acceptance of the patent whether opposed or unopposed the patent will be granted to the applicant under seal of the Patent Office. The date of the patent will be the date of application (S. 11).

A patent obtained by a true and first inventor may be removed and a new patent may be granted to the rightful owner, inventor or assignee.

### **Term of Patents**

The term for which a patent is granted in India and England is 16 years from the date of application. If any additions are made to the patents which are attached to the original patents, the patents of additions are also given (S. 14).

### **Extension of the Term of the Patent**

In cases where the extension to the term of the patent is desired the Indian rule is that an application for extension must be left at the Patent Office at least six months before the time limited for the expiration of the patent. Any person can lodge his opposition by giving notice to the Controller. The matter is then referred to the Central Government or to the High Court and when any of these parties to whom the matter is referred are satisfied that the patent has not been sufficiently remunerative, they may extend the term of the patent for a further term not exceeding five years, or in exceptional cases ten years, or may order the grant of a new patent for such term not exceeding ten years [S. 15(6)].

Almost similar is the rule of procedure under the English Law on all the points where the High Court of England is referred to as the deciding authority.

### **Restoration of Lapsed Patent**

A patent may lapse due to the failure of the patentee to pay the fee prescribed within the time appointed, but the same may be restored on an application stating the circumstances which led to the omission of the payment of the prescribed fee. If the Controller finds

that the omission was unintentional or unavoidable and that there was no undue delay in the making of the application for restoration, he may advertise the application and after the expiration of the prescribed period hear the case subject to an appeal order for restoration or otherwise (S. 16).

### **Register of Patents**

In the Patent Office a book called the Register of Patents shall be kept in which all the names and addresses of the grantees of patents are entered together with notifications of assignments and transmissions of the said patents or amendments, extensions and revocations (S. 20).

### **Effect of Patent**

The effect of a patent is that it gives an exclusive right to the inventor and will bind all parties including His Majesty the King which means all the Officers and departments of the State. However, the proprietor of the patent has a right to assign it to the Central Government in India or the Crown in India either for valuable consideration or without it.

### **Designs**

Designs may also be registered by an application to the Controller and such registered design may be in more than one class. The certificate of registration shall be given for the designs by the Controller and a register has to be maintained for designs also as in the case of patents.

A 'design' is defined by the Indian Patents and Designs Act, 1911, as—

"design" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in Section 478, or property mark as defined in Section 479 of the Indian Penal Code [S. 2(5)].

### **COPYRIGHT**

The Indian Copyright Act of 1914 closely follows the English Act of 1911 or in fact is an adaptation of the English Act so that the uniformity between the two Acts may not be endangered. Only modifications here and there were made to suit Indian conditions.

### Nature and Scope of Copyright

The Copyright subsists under the Act, throughout the parts of His Majesty's dominions to which the Act applies, in every original literary, dramatic, musical and artistic work first published within the British dominions and in the case of an unpublished work, if the author was at the date of the making of the work a British subject or resident within the British Empire or dominions but in no other works except so far as the protection conferred by the Copyright Act as extended by Orders in Council on the Act under self-governing dominions to which this Act did not apply originally or to foreign countries (S. 1).

The "copyright" is defined as follows :—

For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; if the work is unpublished, to publish the work or any substantial part thereof ; and shall include the sole right—

- (a) to produce, reproduce, perform, or publish any translation of the work ;
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work ;
- (c) in the case of a novel or other non-dramatic work or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise ;
- (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered ;

and to authorize any such acts as aforesaid [S. 1(2)].

In this connection it should be noted that the copyright is conferred in respect of published or unpublished original literary, dramatic, musical and artistic work. **Ideas and opinions are not the subject of copyright but only the form in which such ideas or opinions are expressed are subject to copyright and that too to the extent that a substantial part of the form must not be copied.**

### Literary Work

The copyright in the case of 'literary work' is strictly confined to the literary composition of the author and not his ideas or opinions. Among literary works are included **maps, charts, plans, tables and compilations.** The name or title of the book is, generally speaking, not the subject of copyright unless the title also constitutes a literary composition within the meaning of law.

**Dramatic and Musical Work**

There is a copyright in dramatic and musical works not only in the actual wording of the work, but also in the various dramatic incidents created, with the result that if they are all taken simultaneously, there may be an infringement in connection with the copyright. In cases of scenic arrangement or acting on the stage it is held that they cannot be the subject of copyright unless some convenient form is given to them. In the case of moving pictures the film is taken as a dramatic work where a combination of the incidents represented give the work an original character.

**Artistic Works**

Artistic works are also subjects of copyright in which are included works of painting, drawing and artistic craftsmanship and works of art and photographs. In the case of a building, its design and structure have a copyright as an artistic work in the same way. The artistic work connected with engravings and photographs may have a copyright.

**Infringement of Copyright**

Copyright in a work is deemed to be infringed by a person who without the consent of the owner of the copyright, does anything, the sole right to do which is conferred on the owner of the copyright (S. 2). This is, however, subject to the condition that any fair dealing with any work for the purposes of study, research, criticism, review or newspaper summary, will not be an infringement of the copyright. If a publication of a collection is composed of non-copyright matter for the use of schools and is so described in the title and in advertisements by the publisher, it is not infringement of copyright provided that the passages taken are not more than two from works by the same author. The publication in a newspaper of a report of a lecture delivered in public is not an infringement of the copyright, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture, at or about the main entrance of the building in which the lecture is given; neither is it an infringement where a person reads in public, any reasonable extract from any published work. However, a copyright in a work shall be deemed to be infringed by any person in the following cases:—

- (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or
- (b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
- (c) by way of trade exhibits in public; or
- (d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends, any work which to his

knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place [S. 2(2)].

Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright [S. 2(3)].

### **Term of Copyright**

Normally the term of the copyright is the lifetime of the author and a period of fifty years after his death. However, at any time after the expiration of twenty-five years, or where copyright subsists at the passing of the Copyright Act of 1914, after expiration of thirty years, from the death of the author of a published work, the copyright cannot be regarded as infringed in cases where a notice of intention to reproduce the work is given in writing and royalties for the benefit of the owner of the copyright are paid for the copies so published (S. 3). In cases, however, of translations first published in British India, the sole right to produce, reproduce, perform or publish such translations shall subsist only for ten years (S. 4).

Where the work has been written by two or more authors where contributions of each cannot be distinguished, the copyright will subsist during the lifetime of the author who first dies and for a term of fifty years thereafter or during the life of the author who dies last whichever period is longer (S. 16).

### **Insolvency of Owner of Copyright**

Where the owner of copyright who becomes bankrupt, has in his turn secured the assignment of the copyright in his own favour by the author of the work on condition that the insolvent owner was liable to pay royalties, neither the official assignee, nor the trustee in bankruptcy can sell or authorize the sale of the assignment of this copyright to any buyer except on condition that the said purchaser continues to pay to the author the same royalty as was payable by the bankrupt assignee or owner.

### **Copyright in Photographs**

The term for which copyright shall subsist in photographs is fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the owner of the negative at the time it was made, will be the proprietor or author of the work with copyright in photographs (S. 21).

## CHAPTER XXI

### INDUSTRIAL LAW

It is our purpose to deal with certain miscellaneous industrial and other Acts which are necessary for study to the students of commerce along with the subject of Mercantile Law and which happen to be on the syllabuses for the B.Com. degree of various Indian universities, as well as other professional examination boards.

#### INDIAN FACTORIES ACT

The law regulating labour in factories was consolidated by the **Factories Act, 1934**, which was further amended by Act XI of 1935. This Act was originally passed as the Indian Factories Act in the year 1911 and was amended or modified during subsequent years, the last modification to the latter Act being made in the year 1931. **The object of the Factories Act** is to protect the position of workmen of various ages employed in factories of both the sexes, by laying down rules relating to their health and safety, conditions of employment, etc.

#### Factory

For the purpose of this Act, the word "factory" is defined as follows:—

**"Factory"** means any premises including the precincts thereof wherein twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but **does not include a mine** subject to the operation of the Indian Mines Act, 1923."

The word **manufacturing process** as used in the above definition means any process—

- (i) for making, altering, repairing, ornamenting, finishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal; or
- (ii) for pumping oil, water or sewage; or
- (iii) for generating, transforming or transmitting power.

#### Health and Safety

The Act deals with the health and safety of employees in a special Chapter and lays down that the factory should be (1) kept clean and free from effluvia arising from any drain, privy or other nuisance, (2) that it shall not be overcrowded while the work is carried on therein so as to be injurious to the health of the employees, (3) that

It shall be ventilated in such a manner as may be prescribed, (4) that adequate measures shall be taken so as to render harmless as far as practicable any gas, vapours, dust or other impurities generated in course of work carried on therein that may be injurious to health, (5) that atmosphere shall not be rendered so humid by artificial means as to be injurious to the health of the persons employed therein.

In connection with the above the law provides that in the case of factories carrying on a process involving the creation of dust or other impurities, which when inhaled by the workers is injurious to their health, the inspector may, if he thinks that this inhalation could to a great extent be prevented by the use of a fan, or other mechanical device, get it done by serving a notice on the manager of the factory in writing.

There are similar provisions to ensure that the factory shall be sufficiently lighted, that the water used for humidifying shall be pure and that the public supply of drinking water or any other source of water ordinarily used for drinking is effectively purified before use. Proper sanitary arrangements such as suitable latrine accommodation, as well as, when the local Government requires, a separate urinal accommodation for the employees, have to be provided and the drinking water has to be maintained in sufficient quantity for the use of employees. The doors have to be constructed in a way as to open outwards and proper fire escapes have to be maintained.

### Fencing of Machines

Regarding machinery, the Act provides that it should be properly fenced so that the safety of the workmen employed in the factory and near the dangerous types of machinery is assured as far as possible. The inspectors have to see that this fencing must be constantly maintained in an efficient state. It has been held in one case, viz. *Jackson v. I. G. Mulliner Motor Body Co., Ltd.*, (1911) 1 K.B. 546, that this obligation for fencing is absolute and applies to every hoist or tangle whether connected with mechanical power or not. It is not sufficient that this fencing is done in a manner usual in the best factories of the district, but it must be fenced according to the best method known at the time so as to be equally safe whichever way the machinery is worked. [*Schofield v. Schunck*, (1855) 24 L.T. (O.S.).] In one other case the court went further and laid down that it was necessary to fence even though it is commercially impracticable or mechanically impossible to fence securely. (*Davis v. Thomas Ovan & Co., Ltd.*, (1919) 2 K.B. 39.) The trend of all the English decisions clearly shows that the courts have taken the requirements of the Act as to fencing very seriously



and have persisted in emphasising that there should be no possible concession in this connection.

### **Women and Children**

A child under the Act means a person who is under the age of fifteen years. The Act prohibits the presence of children in any factory or any part thereof, where in the opinion of the inspector their presence involves danger or injury to the health of such children. It also provides that women or children shall not be allowed to clean any part of the mill gearing or machinery of a factory while it is in motion, or to work between the fixed and traversing parts of any self-acting machine while such machine is in motion. Women and children are also not to be employed in any part of the factory used for pressing cotton in which a cotton opener is at work; provided that, if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending from the floor to the roof, (or to such height as the inspector may, in any particular case, specify) women and children may be employed in the room in which the feed-end is situated (Sec. 29).

A further provision in this regard is that no child is to be employed in any factory who does not possess a certificate to the effect that he is not less than twelve years of age and is fit for employment in a factory. No child is to be employed before six o'clock in the morning or after seven o'clock in the evening and shall not be allowed to work for more than five hours in any one day.

In the case of women, no women can be employed before six o'clock in the morning or after seven o'clock in the evening and in the aggregate for more than 10 hours in any one day. Here also an interval of at least one hour ought to be provided for and no female employee can be employed at one time at a stretch for more than six hours.

### **Hours of Employment Generally**

Generally speaking, for all employees the provision is that no person shall be employed in a factory for more than fifty-four hours in any week or if the factory is a seasonal one for more than sixty hours in one week, or more than ten hours in any one day. The other rule which applies to all classes of workmen is that no workman is to be employed on a Sunday unless he has had or is going to have a holiday for a whole day on one of the three days immediately preceding or succeeding the Sunday and the manager has, previous to the Sunday or substituted day whichever is earlier, given notice of his intention to do so to the inspector and displayed a notice to that effect in the factory.

The rules with regard to these hours have been very strictly construed in English law courts where in one case, viz. *Prior v. Slaithwaite Spinning Co.*, (1898) 1 Q.B. 881, a boy who cleaned machinery for his own amusement during meal times was held to be working. Further it is provided that the manager should see that no person is employed in his factory whom he knows, or has reason to believe, to have already been employed on the same day in any other factory.

### **Inspectors and Certifying Surgeons**

We have seen all throughout that inspectors are referred to in this section. These are officers appointed by the Local Government by notification in the local official "Gazette" to act in such a capacity. These inspectors are persons who are not directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith. These inspectors have powers subject to the rules in that behalf which they can exercise within the local limits for which they are appointed—

(a) to enter, with such assistants (if any), being persons in the employment of Government or of any municipal or other public authority, as they think fit, any place which is, or which they have reason to believe to be, used as a factory or capable of being declared to be a factory under the provisions of Section 5;

(b) to make such examination of the premises and plant and of any prescribed registers, and take on the spot or otherwise such evidence of any persons as they may deem necessary for carrying out the purposes of this Act; and

(c) to exercise such other powers as may be necessary for carrying out the purposes of this Act.

Provided that no one shall be required under this section to answer any question or give any evidence tending to criminate himself (Sec. 11).

### **Certifying Surgeons**

These are medical officers appointed by the local Government in the same manner, whose duty it shall be to issue certificates to persons desirous of being employed in a factory situated within the limits for which they are appointed, or on the application of parents or guardians of such persons, or of the manager of such factory in which such persons desire to be employed after examination. The certificate is to be given in a prescribed form stating the age as nearly as can be ascertained by examination and that the person is fit for such employment. These surgeons have full power to revoke any certificate entered by them granted to any child who in their opinion is no longer fit for employment in a factory. Where such certificate is refused the certifying surgeon has to state in writing his reason,

for such refusal. The certifying surgeon has a right to authorize any registered practitioner to exercise the functions assigned to him as to examination, but the certificate given by such person must be confirmed on personal examination by the certifying surgeon himself, if it is to continue for a period of more than three months (Sec. 12). In other words, a certificate granted by the nominee of the certified surgeon shall expire after three months of the date on which it is granted.

### WORKMEN'S COMPENSATION ACT, 1923

This Act creates a liability to pay compensation for an accident under certain circumstances and not to pay damages. The idea here is that if a workman employed in the service or employment, meets with an accident or injury, the employer would become liable under certain circumstances to pay compensation to the workman or to those dependent upon him. The Act lays down that if personal injury is caused to a workman by accident in course of his employment or arising out of it, the employer shall be liable to pay compensation as provided by the Act.

#### Cases Where Employer Not Liable

The cases where employer is *not* liable are : -

(1) when the injury does not result in total or partial disablement for a period exceeding 10 days.

(2) when the injury is caused at the time when the workman was under the influence of drinks or drugs or was wilfully disobeying an order expressly given or breaking a rule expressly framed for his safety or his wilful removal or disregard of any safety-guard or other device which to his knowledge was provided for the purpose of securing his safety (S. 3).

The word accident is here used in its popular sense. A disease contracted as a result of continued occupation in a particular employment is not a personal injury by accident within the Act. The workman concerned has also to establish that the incapacity was the **natural and probable consequence of the injury**. The employment of the workman does not necessarily commence from the moment when he reaches the place where he has to begin his work and to the moment when he ceases that work. A reasonable interval of time and space has to be included. (*Gane v. Norton Hill Colliery Co.*, (1909) 2 K.B. 539.)

When a workman is employed to do a particular work and he goes outside his own sphere and interferes with a machine which has nothing to do with his work and which is assigned to some other workman, he cannot claim compensation. (*Love v. Pearson*, (1899) 1 Q.B. 261.) If, however, though in course of employment, the accident which has occurred is an ordinary accident of life, there can

be no claim for compensation; as for example in one case where a workman sprained his finger while removing his socks preparatory to his work or where a man was seized with giddiness causing him to fall downstairs it was held that a claim did not arise out of an accident specially connected with the employment. (*Peel v. Lawrence & Sons, Ltd.*, (1912) 5 B.W.C.C. 274; *Buttler v. Burton-on-Trent Union*, (1912) 5 B.W.C.C. 355.)

Of course the workman himself or all those who claim on his behalf must prove that the accident arose out of and in course of employment; in other words, the onus of proof is on him. (*Ponufret v. Lancashire & Yorkshire Railway Co.*, (1903) 2 K.B. 718.)

### Who is a Workman?

"Workman" is defined by Section 2(1)(n) of Workmen's Compensation Act of 1923 as amended up to 1933 as "any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is--

(i) a railway servant as defined in section 3 of the Indian Railways Act, 1890, not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or

(ii) employed on monthly wages not exceeding three hundred rupees, in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral, or in writing; but does not include any person working in the capacity of a member of His Majesty's naval, military or air forces and any reference to a workman who has been injured shall, where the workman is dead include a reference to his dependents or any of them"

The Schedule II as referred to above further elaborates the definition by stating that the following persons would fall under the heading of workman within the meaning of Section 2(1)(n) --

(1) employed, otherwise than in a clerical capacity or on a railway, in connection with the operation or maintenance of mechanically propelled vehicles; or

(2) employed, otherwise than in a clerical capacity, in any premises wherein, or within the precincts whereof, on any one day of the preceding twelve months, ten or more persons have been employed in any manufacturing process, as defined in clause (4) of Section 2 of the Indian Factories Act, 1911, or in any kind of work whatsoever incidental to or connected with any such manufacturing process or with the article made, and steam, water or other mechanical power or electrical power is used, or

(3) employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale any article or part of an article in any premises wherein or within the precincts whereof, on any one day of the preceding twelve months, fifty or more persons have been so employed; or

(4) employed in the manufacturing or handling of explosives in any premises wherein, or within the precincts whereof, on any one day

of the preceding twelve months, ten or more persons have been so employed; or

(5) employed, in any mine as defined in clause (f) of Section 3 of the Indian Mines Act, 1923, in any mining operation, or in any kind of work, other than clerical work, incidental to or connected with any mining operation or with the mineral obtained, or in any kind of work whatsoever below ground.

Provided that any excavation in which on no day of the preceding twelve months more than fifty persons have been employed or explosives have been used, and whose depth from its highest to its lowest point does not exceed twenty feet, shall be deemed not to be a mine for the purpose of this clause; or

(6) employed as the master or as a seaman of—

(a) any ship which is propelled wholly or in part by steam or other mechanical power or by electricity or which is towed or intended to be towed by a ship so propelled; or

(b) any ship not included in sub-clause (a) of fifty tons net tonnage or over; or

(7) employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew, or in the handling or transport within the limits of any port subject to the Indian Ports Act, 1908, of goods which have been discharged from or are to be loaded into any vessel; or

(8) employed in the construction, repair or demolition of—

(a) any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof; or

(b) any dam or embankment which is twenty feet or more in height from its lowest to its highest point; or

(c) any road, bridge, or tunnel; or

(d) any wharf, quay, sea-wall or other marine work including any moorings of ships; or

(9) employed in setting up, repairing, maintaining, or taking down any telegraph or telephone line or post or any overhead electric line or cable or post or standard for the same; or

(10) employed, otherwise than in a clerical capacity, in the construction, working, repair or demolition of any aerial ropeway, canal, pipe-line, or sewer; or

(11) employed in the service of any fire brigade; or

(12) employed upon a railway as defined in clause (4) of Section 3, and sub-section (1) of Section 148 of the Indian Railways Act, 1890, either directly or through a sub-contractor, by a person fulfilling a contract with the railway administration; or

(13) employed as an inspector, mail guard, sorter or van-peon in the Railway Mail Service, or employed in any occupation ordinarily involving out-door work in the Indian Posts and Telegraphs Department; or

(14) employed, otherwise than in a clerical capacity, in connection with operations for winning natural petroleum or natural gas; or

(15) employed in any occupation involving blasting operations; or

(16) employed in the making of any excavation in which on any one day of the preceding twelve months more than fifty persons have been employed or explosives have been used, or whose depth from its highest to its lowest point exceeds twenty feet; or

(17) employed in the operation of any ferry boat capable of carrying more than ten persons; or

(18) employed, otherwise than in a clerical capacity, on any estate which is maintained for the purpose of growing cinchona, coffee, rubber or tea, and on which on any one day in the preceding twelve months twenty-five or more persons have been so employed; or

(19) employed, otherwise than in a clerical capacity, in the generating, transforming or supplying of electrical energy or in the generating or supplying of gas; or

(20) employed in a light-house as defined in clause (d) of Section 2 of the Indian Light-house Act, 1927; or

(21) employed in producing cinematograph pictures intended for public exhibition or in exhibiting such pictures; or

(22) employed in the training, keeping or working of elephants or wild animals; or

(23) employed as a driver.

*Explanation.*—In this Schedule, “the preceding twelve months” relates to any particular case to the twelve months ending with the day on which the accident in such case occurred.

### Amount of Compensation

When death occurs the compensation in the case of an adult is a sum equal to thirty months' wages or rupees two thousand five hundred, whichever is less. In the case of a minor it is rupees two hundred.

Where permanent total disablement results a sum of forty-two months' wages or rupees three thousand five hundred, whichever is less, is payable to an adult whereas a sum equal to eighty-four months' wages or rupees three thousand five hundred, whichever is less, is payable to a minor.

If the permanent disablement is not total but partial, the following table is laid down in Schedule I of the Act:—

#### *List of injuries deemed to result in permanent partial disablement*

Injury	Percentage of loss of earning capacity
Loss of right arm above or at the elbow ..	70
Loss of left arm above or at the elbow ..	60
Loss of right arm below the elbow ..	60
Loss of leg at or above the knee ..	60
Loss of left arm below the elbow ..	50
Loss of leg below the knee ..	50
Permanent total loss of hearing ..	50
Loss of one eye ..	30
Loss of thumb ..	25
Loss of all toes of one foot ..	20
Loss of one phalanx of thumb ..	10
Loss of index finger ..	10
Loss of great toe ..	10
Loss of any finger other than index finger ..	5

**NOTE.**—Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent of the loss of that limb or member.

In cases of temporary disablement, total or partial, a half-monthly payment is made on the sixteenth day after the expiry of a waiting period of ten days from the date of disablement and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter. This payment is to an adult at the rate of rupees fifteen or a sum equal to one-fourth of his monthly wages, whichever is less, and in the case of a minor it is a sum equal to one-third or after he has attained the age of fifteen years half of his monthly wages but not exceeding in any case rupees fifteen (S. 4).

Also if the injury has occurred when the workman was under the influence of drink or drugs or was wilfully disobedient to the order expressly given in connection with securing the safety of workmen or where there was wilful removal or disregard by the workman of any safety-guard or other device which he knew to have been provided for the purpose of securing the safety of workmen, the employer shall not be liable for any injury caused to him under such circumstances. Not only this but even a workman, employed in any employment which involves the handling of wool, hair, bristles or animal caracasses or the loading, unloading or transfer of any merchandise, contracts the disease of anthrax or if a workman while in the service of an employer in whose service he has been employed for a continuous period of not less than six months in one of the employments specified in Schedule III of the Act, contracts any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this Act and unless the employer proves to the contrary, the accident should be deemed to have arisen out of and in the course of the employment. The period of service is to be deemed to be continuous which has not included a period of service under any other employer during that time. Schedule III referred to above is as shown below.

### SCHEDULE III

#### *List of Occupational Diseases*

Occupational disease	Employment
Lead poisoning or its sequelae	Any process involving the use of lead or its preparations or compounds.
Phosphorus poisoning or its sequelae	Any process involving the use of phosphorus or its preparations or compounds.
Mercury poisoning or its sequelae	Any process involving the use of mercury or its preparations or compounds.

**SCHEDULE III—(Con'd.)**

Occupational disease	Employment
Poisoning by benzene and its homologues, or the sequelae of such poisoning	Handling benzene or any of its homologues; and any process in the manufacture or involving the use of benzene or any of its homologues.
Chronic ulceration or its sequelae	Any process involving the use of chromic acid or bichromate of ammonium, potassium or sodium or other preparations.
Compressed air illness or its sequelae	Any process carried on in compressed

**Monthly Wages**

Monthly wages are calculated as follows:—

(1) where the workman has, during a continuous period of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the workman shall be one twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period

(2) in other cases, the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period.

**Distribution of Compensation**

The Act provides that compensation in the case of injury resulting in death has to be deposited with the Commissioner and that no payment should be made directly by the employer except for funeral expenses advanced by the employer to any dependent or other person not exceeding rupees one hundred in the case of any one dependent. This advance may of course be deducted from the compensation amount ultimately deposited with the Commissioner. The Commissioner is given full power to apportion among the dependents of the deceased workman this deposit after deducting any amount which he may have paid as advance. It, however, the amount is to be payable to a woman or a person under a legal disability the same may be invested or otherwise dealt with for the benefit of such woman or person under disability (Sec. 8).

The Commissioner must be given notice of the accident as soon as practicable after the happening of the event and the proceedings which should then be commenced within six months of the



occurrence of such an accident. In case the accident has resulted in contracting a disease, it shall have been taken to have occurred on the first of the days within which the workman was continuously absent (Sec. 10). It has been held that incapacity for work means loss or diminution of the wage earning capacity and includes inability to get work as a result of the injury which the workman has sustained. (*Ball v. Hunt & Sons, Ltd.*, (1912) A.C. 496.)

### Commissioners

We have seen that the Commissioners play an important part in connection with the working of this Act. These Commissioners are appointed by the local Government by notification in local official Gazette and are deemed to be public servants. These are the officers before whom, in default of an agreement, all proceedings under this Act on the question of liability for compensation including the question as to whether the person injured was a workman have to be referred. No civil court has jurisdiction to settle these questions which are thus brought under the jurisdiction of the Commissioner. Of course, the Commissioner to be referred to is the Commissioner for the local area in which the accident takes place (Secs. 19-20-21). The Act aims at an amicable settlement if possible between the employer and the workman and the application therefore has not to be made to the Commissioner unless and until the question at issue is one on which they have been unable to settle by agreement. The Commissioner is given all the powers of a civil court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling production of documents. A brief memorandum of the substance of the evidence of other witnesses has to be taken down by the Commissioner. He may, if he thinks fit, submit any question of law for decision to the High Court (Secs. 23, 25 and 27). If, however, the parties have come to a settlement the memorandum thereof is to be sent by the employer to the commissioner, who on being satisfied as to its genuineness records same in a register kept for the purpose.

### Appeals

There is an appeal to the High Court from the following orders of the Commissioner:—

- (1) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;
- (2) an order refusing to allow redemption of a half-monthly payment;
- (3) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(4) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of Section 12 ;  
or

(5) an order refusing to register a memorandum or agreement or registering the same or providing for the registration of the same subject to conditions.

Provided, further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties.

(a) The period of limitation for an appeal under this section shall be sixty days.

(b) The provisions of Section 5 of the Indian Limitation Act, 1908, shall be applicable to appeals under this Section.

## INDIAN TRADE UNIONS ACT, 1926

### Trade Union

A "trade union" is defined by the Act as any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.

### Registration

Any seven or more members of a trade union may subscribe their names to the rules of the trade union and otherwise complying with the provisions of the above Act apply for registration under the Act to the registrar of trade unions appointed by the local Government for the province (Secs. 3 and 4). The application has to be accompanied by the following :—

(1) the names, occupations and addresses of the members making the application ;

(2) the name of the trade union and the address of its head office ; and

(3) the titles, names, ages, addresses and occupations of the officers of the trade union (Sec. 5).

This registration shall not be given unless the executive is constituted according to the provisions of this Act and the rules of the union provided for the following matters :—

(1) the name of the trade union ;

(2) the whole of the objects for which the trade union has been established ;

(3) the whole of the purposes for which the general funds of the trade union shall be applicable, all of which purposes shall be purposes to which such funds are all fully applicable under this Act ;

(4) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the trade union is connected, and also the admission of the number of honorary or temporary members as officers required under Section 22 to form the executive of the trade union ;

(5) the maintenance of a list of the members of the trade union and adequate facilities for the inspection thereof by the officers and members of the trade union ;

(6) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members ;

(7) the manner in which the rules shall be amended, varied or rescinded ;

(8) the manner in which the members of the executive and the other officers of the trade union shall be appointed and removed ;

(9) the safe custody of the funds of the trade union, an annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the officers and members of the trade union ; and

(10) the manner in which the trade union may be dissolved.

The precaution to be taken here is that the name under which the union seeks to be registered is not similar to that of any existing union (Sec. 7). On registration the registrar issues a **certificate of registration** in the prescribed form which is **conclusive evidence** of the fact that the said trade union has been duly registered.

The registrar, of course, has the right to withdraw or cancel this certificate either on the application of a trade union itself or where the registrar is satisfied that the certificate has been obtained by fraud or mistake or that the said trade union has ceased to exist or after receiving notice from the registrar it wilfully contravened any provision of this Act : the same would be the case if the union had allowed any rule to continue in force which is inconsistent with any such provision of the Act or has rescinded any rule provided for any matter, provision for which is required by Section 6 (Sec. 10). The party aggrieved either through the withdrawal or cancellation of certificate has a right to appeal within the prescribed period to such judge not below the grade of an additional or assistant judge of a principal civil court of original jurisdiction as the local Government may appoint in this matter. Acts such as Societies Registration Act, 1860, Co-operative Societies Act, 1912, Provident Insurance Societies Act, 1912, the Indian Life Assurance Companies Act, 1912, and the Indian Companies Act, 1913, shall not apply to any trade union.

### **Funds of the Trade Union**

The funds of a registered trade union cannot be spent on objects other than those laid down by the Act such as,

(1) payment of salaries and allowances and expenses to its officers or payment of expenses for its administration including audit of accounts ;

(2) for prosecuting or defending a legal action to which the union or any of its members is a party. When such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the union or any rights arising out of the relations of any member with his employer or with a person whom the member employs ;

(3) the conduct of trade disputes on behalf of the trade union or any member thereof ;

(4) the compensation of members for loss arising out of trade disputes ;

(5) allowances to members or their dependents on account of death, old age, sickness, accidents or unemployment of such members ;

(6) the issue of, or the undertaking of liability under, policies of assurance on the lives of members, or under policies insuring members against sickness, accident or unemployment ;

(7) the provision of educational, social or religious benefits for members (including the payment of the expenses of funeral or religious ceremonies for deceased members) or for the dependents of members ;

(8) the upkeep of a periodical published mainly for the purpose of discussing questions affecting employers or workmen as such ;

(9) the payment, in furtherance of any of the objects on which the general funds of the trade union may be spent, of contributions to any cause intended to benefit workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time, during the year, be in excess of one-fourth of the combined total of the gross income which has up to that time accrued to the general funds of the trade union during that year and of the balance at the credit of those funds at the commencement of that year.

### **Constitution of Separate Fund for Political Purposes**

The trade union is permitted by the Act to constitute a separate fund from contributions separately levied for such funds and out of this fund payments may be made for the promotion of civic and political interests of its members in furtherance of the following objects :—

(1) the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislative body constituted under the Government of

India Act or of any local authority, before, during, or after the election in connection with his candidature or election; or

(2) the holding of any meeting or the distribution of any literature or document in support of any such candidate or prospective candidate; or

(3) the maintenance of any person who is a member of any legislative body constituted under the Government of India Act or of any local authority; or

(4) the registration of electors or the selection of candidate for any legislative body constituted under the Government of India Act or for any local authority; or

(5) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

The above is subject to the condition that no member of the union shall be compelled to contribute to the above fund for political purposes and that the union shall not have the right to exclude such member from the benefit of the union or to inflict any disability by reason of that for such non-payment. Neither has the union has a right to make such contribution for political purposes a condition precedent for admission to its membership (Sec. 16).

### **Books of Trade Union**

The books of accounts of a registered trade union and its list of members shall be open to inspection by any officer or member of the trade union at such times as may be provided for in the rules.

### **Dissolution**

When the trade union is dissolved the notice of such dissolution signed by seven members and the secretary must **within fourteen days** of such dissolution be sent to the registrar. The registrar has to see that the said dissolution has been effected in accordance with the rules of the union. If the rules do not provide for the distribution of funds on dissolution, the registrar is given the power by the Act to divide the funds amongst the members of the union in such manner as may be prescribed.

## **INDIAN TRADE DISPUTES ACT, 1929**

At the close of the war there was a great outbreak of industrial unrest on a large scale which led to the passing of the above Act by the Government of India after exploring the possibility to **provide some machinery for the settlement of industrial disputes**. The objects and reasons of this Act state that enquiries made with this objective in the year 1920 led to the conclusion that the conditions then existing in legislation for this purpose were not likely to be affected but that succeeding years saw a distinct change in the position through the growth of organizations of industrial workers and, the

increasing influence exercised by public opinion on the courts of disputes. Thus the above Act came to be taken seriously in hand and passed. The main Chapters 3-14 of this Act relate to the establishment of tribunals for the investigation and settlement of trade disputes and the material has been taken generally from the British Industrial Courts Act of 1909. The Act provides for some sort of a tribunal to which the industrial disputes may be referred and here it differs from the British Act inasmuch as the said Act sets up a standing industrial court, whereas the Indian Act provides for conciliation boards which are to be appointed *ad hoc* like the courts of inquiry in order to deal with disputes.

The Indian Trade Disputes Act 1929 extends to the whole of British India including British Baluchistan and the Santal Parganas. It lays down that wherever any trade dispute existed or is apprehended between an employer and any of his workmen or where the employer is the head of a department under the control of the Central Government or is the Federal railway authority or a railway company operating a federal railway, the Central Government may, by ordinary writing (a) refer any matters appearing to be connected with or relative to the disputes to a court of enquiry to be appointed by the Provincial Government or the Central Government as the case may be, or (b) order the dispute to a board of conciliation to be appointed by the Provincial Government or the Central Government, as the case may be, for promoting a settlement thereafter. However, where both the parties to the dispute apply either separately or conjointly, for a reference to a court, or where both parties apply whether separately or conjointly for a reference to a board and the authority having the power to appoint is satisfied that the persons applying represent the majority of each party, the court or board as the case may be, shall be appointed accordingly.

For the purpose of this Act, an employer is defined as under :—

“*employer*”, in the case of any industry, business or undertaking carried on by any department of (any Government in British India), means the authority prescribed in this behalf or, where no authority is prescribed, the head of the department.

A workman is defined as under :—

“*workman*” means any person employed in any trade or industry to do any skilled or unskilled manual or clerical work for hire or reward, but does not include any person employed in the naval, military or air service of the Crown.

A trade dispute is defined as under :—

“*trade dispute*” means any dispute or difference between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person ;

**Courts of Enquiry and Boards of Conciliation**

The court of enquiry is to consist of an independent chairman and such other independent persons as the appointing authority thinks fit or may, if such authority thinks fit, consist of one independent person. This court may act as long as there is the prescribed quorum notwithstanding any vacancy in the number of its members other than the chairman and may enquire into the matter referred to either in public or in private at its discretion, reporting thereon to the authority by which the court was appointed. The court may also, if it thinks fit, make interim reports.

The board of conciliation shall consist of a chairman and two or more other members, as the appointing authority thinks fit, or may, if such authority thinks fit, consist of one independent person. Where the board consists of more than one person the chairman shall be an independent person and the other members shall be either independent persons or persons appointed in equal numbers to represent the parties to the dispute. All persons appointed to represent a party shall be appointed on the recommendation of their party, provided, however, that if any party fails to make the necessary recommendation within the prescribed time, the appointing authority shall elect and appoint such person as it thinks fit to represent that party. The board having the prescribed quorum may act notwithstanding any vacancy in the number of its members other than the chairman, provided, however, that where the board includes an equal number of persons representing the parties to the dispute and the services of any such persons cease to be available before the board has completed its work, the authority appointing the board shall appoint another person to take his place, and the procedure shall be continued before the board so constituted. The duty of the board of conciliation will be primarily to endeavour to bring about a settlement of the dispute referred to it and for this purpose the board shall, in such manner as it thinks fit and without delay, investigate the dispute and all matters affecting the merits thereof and the right settlement thereat and in so doing may do all such other things as it thinks fit for the purpose of inducing the parties to come to a fair and equitable settlement of the dispute and may adjourn the proceedings for any period sufficient in its opinion to allow the parties to agree upon terms of settlement. If no settlement is arrived at during the course of the investigation the board must, as soon as possible after the close of the investigation send a full report regarding the dispute to the authority by which the board is appointed setting forth the proceedings and the steps taken by the board for the purpose of ascertaining the facts and circumstances relating to the dispute and of bringing about a settlement of it together with

a full statement of facts and circumstances and its findings and recommendations as it may think fit.

If, on the other hand, a settlement of the dispute is arrived at, a memorandum of settlement must be drawn up by the board and signed by the parties, which memorandum and the board's report of the settlement must be sent to the party by which the board was appointed.

It will thus be seen that the objects of the court of enquiry are to investigate and report on such questions connected with the dispute as may be referred to them. The object of the board of conciliation is to try if possible to secure a settlement of the dispute. Both these courts are empowered to enforce the attendance of witnesses and production of documents. The reports of both these authorities are to be published. However, neither party to the dispute is bound to accept the findings either of this court of enquiry or the advice of the board of conciliation but what is sought to be achieved is that a publication of the reports will bring into balance the force of public opinion whereby just conclusions on the report of the dispute may be reached.

#### **Public Utility Services**

With reference to public utility services, however, the above Act lays down a punishment, viz. imprisonment which may extend to one month or fine which may extend to Rs. 50 or both where any person employed in a public utility service goes on a strike in breach of contract without having given to his employer, within one month before so striking, not less than 14 days' previous notice in writing of his intention to go on strike, or where having given such a notice, goes on strike before the expiry of the said notice.

A similar punishment, viz. imprisonment which may extend to one month or a fine which may extend to Rs. 1,000 or more is provided for in case of an employer carrying on public utility service who locks out his workmen in breach of contract without having given them within one month before such lock-out not less than 14 days' notice in writing of his intention to lock them out, or having given such notice locks them out before the expiry of the said notice. Where such employer is a corporation, company or other association of persons, any secretary, director, or other officer or person concerned with the management of these bodies shall be punishable unless he proves that the offence was committed without his knowledge and without his consent.

#### **Illegal Strikes and Lock-outs**

A strike or a lock-out shall be illegal which—

(a) has any object other than the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged; and



(b) is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby to compel (any Government in British India, the Federal Railway Authority or the Crown Representative) to take or abstain from taking any particular course of action.

The Act also provides for penalties to persons who declare, instigate and incite others to take part or otherwise act in furtherance of a strike or lock-out which is illegal under Section 16, which penalty is simple imprisonment which may extend to three months or fine which may extend to Rs. 200 or to both. However, it has been provided that no court shall take cognizance of any offence under Section 17, i.e., penalties for inciting, etc. an illegal strike, save on complaint made by or under the authority from the appropriate Government.

### **Protection of Persons Refusing to take Part in Illegal Strikes or Lock-outs**

Section 18 of the Act further provides that a person refusing to take part or to continue to take part in any strike or lock-out which is illegal under Section 16 shall not be, by reason of such refusal or by reason of any action taken by him under this Section, subject to expulsion of or in any trade union or society, or to any fine or penalty or to deprivation of any right or benefit to which he or his representatives would otherwise be entitled, or be liable to be placed in any respect either directly or indirectly, under any disability or at any disadvantage as compared with other members of the union or society in spite of any rules to the contrary of a trade union or society.

### **BOMBAY INDUSTRIAL DISPUTES ACT, 1938**

According to the objects and reasons, the All India Trade Disputes Act of 1929 which provides for the appointment of courts of enquiry and boards of conciliation has failed in certain particulars. The procedure, it is argued, in connection with the appointment of these bodies has been found to be so cumbrous and inconclusive in character that the Act has been rarely used in India during the nine years it has been on the Statute book. They point out that the Government of Bombay in 1934 passed the Bombay Trade Disputes Conciliation Act providing for the appointment of a labour officer whose chief duties are to secure redress of the grievances of the work people employed in the textile industry in Bombay city and for the appointment of the Commissioner of Labour as the Chief Conciliator to bring the two parties to the trade dispute in this industry together, with a view to their reaching an amicable settlement of the dispute. It was thus thought possible to extend the provisions of that Act so as to cover the textile industry in other

centres or to cover other trades and industries in different centres but there was nothing in that Act making it obligatory to parties to a trade dispute to endeavour to obtain a settlement of it by conciliation before resorting to a strike or lock-out. Thus the object of the above Bombay Act, according to Government of Bombay, was to ensure that this was done. It is pointed out that most countries of the world have comprehensive schemes of legislation aiming at peaceful settlement of all disputes between the employer and the employee and the provision for prevention of conflict which results in considerable financial losses, not only to the employers and to the employee, but also to the community at large. According to the same authority, the world legislation on this subject varies widely in character, scope and extent and ranges from simple conciliation, either by private arrangement or through prominent conciliators appointed by the State, to compulsory acceptance by both parties of decisions or awards given by industrial arbitration tribunals or by industrial courts.

The Act provides for the registration of unions which have been recognized by employers concerned or which fulfil certain requirements as regards membership. This legislation confers various rights on the unions in connection with representation on behalf of the workers. The Act also provides for the appointment of labour officers and conciliators for each area of the industry in the province and a specific machinery is set up to ensure that the grievances of the workers or any alterations in their condition of service are fully considered. The most important principle enunciated by this Act is that there shall be no strikes or lock-outs until the whole of the machinery provided for by the Act for discussion and negotiation, has been made use of and failing to observe this most necessary first step would make any strike or lock-out, that may be declared, illegal.

The Commissioner of Labour is to be ex-officio chief conciliator under this Act and his jurisdiction extends throughout the province. The Provincial Government may, by notification in the official *Gazette*, appoint any person to be a conciliator, for such local area as may be specified in the notification. Such Government may also, by a similar notification in the official *Gazette* appoint any person to be a special conciliator for such local area or such industry in any local area or for such industrial dispute or class of disputes as may be specified in the notification and may, by a similar notification, appoint any person to be a labour officer for such local area or for such industry as may be specified in the notification.

#### **Board of Conciliation and Court of Industrial Arbitration**

Where an industrial dispute arises the provincial Government may by notification in the official *Gazette*, constitute a board of

conciliation for promoting a settlement of disputes. This board is to consist of a chairman and equal number of persons selected by provincial Government from panels representing the interests of the employers and the employees respectively. The chairman of the board shall be an independent person, i.e. a person shall be deemed to be independent if he is unconnected with the dispute with reference to which the board is constituted and the industry directly affected by the dispute.

### **Court of Industrial Arbitration**

The Provincial Government is also empowered to constitute a court of industrial arbitration for determining industrial disputes and for dealing with other matters under the provisions of the Act. This industrial court is to consist of two or more members, one of whom shall be its president. The members of the industrial court are to be persons who are not connected with any industry and the president shall be a person who is or has been Judge of a High Court or is eligible for being appointed a Judge for such court.

### **Conciliation Proceedings**

The conciliation proceedings provided by the Act begin when any change in the working arrangement or wages, in respect of which notice is given as required by this Act, by any employer under Section 28 or 29 is objected to by either party. The party giving notice and desiring the change has to forward to the registrar, the chief conciliator and the conciliator of the local area a full statement of the case in a prescribed form within 21 days from the date of service of such notice to the other party. The conciliator on receipt of this statement of the case must enter the industrial dispute in the prescribed register and then hold the conciliation proceedings as laid down in the Act. His duty shall be to endeavour to bring about a settlement of the industrial dispute, and for this purpose, he must enquire into the dispute and all matters affecting its merits and do all such things as he then thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute and may adjourn the conciliation proceedings for any period sufficient in his opinion to allow the parties to arrive at a settlement. If a settlement is arrived at, the officer should prepare a memorandum of such settlement in the prescribed form and get it signed by the employer and the representative of employees, and send a report of the proceedings along with a copy of the memorandum of settlement to the registrar and chief conciliator whereupon the registrar must record such settlement in the register and he shall then publish it in such manner as may be prescribed. The change, if any, agreed to by such settlement, shall come into operation from the date agreed

upon in such settlement, and where no such date is agreed upon from the date from which it is recorded in the register.

1. If no settlement is arrived at, the conciliator must as soon as possible after the close of the proceedings send a full report to the chief conciliator and he shall send it to the provincial Government and the Government shall publish the report of the conciliator submitted to it except where the dispute is referred to a board of conciliation.

During the pendency of these proceedings before the conciliator, the Government may, and if both the parties agree either prior to the commencement of such proceedings or after the failure of conciliation to bring about a settlement shall, refer the dispute to a board of conciliation.

On such reference the board is to give notice in the prescribed manner to the parties to appear before it and proceed to endeavour to bring about a settlement of the industrial dispute as far as it can. On conclusion of the board's proceedings, whether a settlement is arrived at or not, the board should send a report of the proceedings to the provincial Government which the said Government shall publish. The board of conciliation are vested with the ordinary powers of the court under the Code of Civil Procedure, 1908, in respect of summoning and enforcing attendance, examining on oath, compelling production of documents, issuing commissions for the examination of witnesses and proving of facts by affidavits. The proceedings before the board may be in public, whereas proceedings before a conciliator are to be in a panel. However, the board may, at any stage direct any particular witness to be examined, or its proceedings to be held in panel.

### **Court of Industrial Arbitration**

The Act claims to break entirely fresh ground by making a provision for the setting up of an industrial court presided over by a High Court judge or a lawyer qualified to be a High Court Judge. This court is to act as a tribunal for voluntary arbitration on matters submitted to it by the parties to the dispute and will also function as a court of final appeal in numerous cases arising out of the working of the Act by the way of appeals from the decisions of the registrar or Commissioner of Labour as regards standing orders which all employers must have, regulating the disciplinary rules and conditions of service applicable to every industrial establishment. The court is the tribunal that will decide whether or not a strike or lock-out is illegal and all questions of interpretation of agreements and awards coming before it. The court shall have the same powers under the Civil Procedure Code as the board of conciliation with regard to witnesses, documents, etc. Every proceeding before this industrial court has to be deemed to be a judicial proceeding under the meaning

of Section 192, 193 and 228 of the Indian Penal Code and it shall have power to direct those by whom the whole or any part of the cost of any proceedings before it shall be paid in connection with the services of any legal adviser engaged by the party. The order of the court shall be binding on—

(a) all parties to the industrial dispute who appeared or were represented before such Court;

(b) all parties who were summoned to appear as parties to the dispute whether they appeared or not, unless the Industrial Court is of opinion that they were improperly made parties;

(c) in the case of an employer who is a party to the proceedings before such Court in respect of the undertaking to which the dispute relates, his successors, heirs or assigns in respect of the undertaking to which the dispute relates; and

(d) in the case of a union which is a party to the proceedings before such Court, all persons who were members of such union on the date of the dispute or who become members of the union thereafter.

No order passed by the industrial court shall be called in question by any civil or criminal court.

### **Illegal Strikes and Lock-outs**

Illegal strikes and lock-outs are defined under this Act, in Section 62, as follows :—

(a) in cases where it relates to any industrial matter mentioned in Schedule I, before the standing orders relating to such matter and submitted to the Commissioner of Labour under Section 26 are settled by him or by the Industrial Court, as the case may be, or before the expiry of six months from the date on which such standing orders come into operation under Section 26;

(b) without giving notice in accordance with the provisions of Section 28;

(c) only for the reason that the employer has not carried out the provisions of any standing order or has made an illegal change;

(d) in cases where notice of the change is given in accordance with the provisions of Section 28 and where no agreement in regard to such change is arrived at, before the statement of the case referred to in Section 34 is received by the Registrar;

(e) in cases where conciliation proceedings in regard to the industrial dispute to which the strike relates have commenced before the completion of such proceedings;

(f) in cases where a submission relating to such dispute or such kinds of dispute is registered under Section 43, until such submission is lawfully revoked; or

(g) in contravention of the terms of a registered agreement, settlement or award.

(2) In cases where conciliation proceedings in regard to any industrial dispute have been completed, a strike relating to such dispute shall be illegal if it is commenced at any time after the expiry of two months after completion of such proceedings.

**Sec. 63.—(1)** A lock-out shall be illegal if it is declared, commenced or continued—

(d) in cases where it relates to any industrial matter mentioned in Schedule I, before the standing orders relating to such matter and submitted to the Commissioner of Labour under Section 28 are settled by him or by the Industrial Court, as the case may be, or before the expiry of one year from the date on which such standing orders come into operation under Section 26;

(b) without giving notice in accordance with the provisions of Section 28;

(c) in cases where notice of the change is given in accordance with the provisions of Section 28 and where no agreement in regard to such change is arrived at, before the statement of the case referred to in Section 34 is received by the Registrar;

(d) in cases where conciliation proceedings in regard to the industrial dispute to which the lock-out relates have commenced, before the completion of such proceedings;

(e) in cases where a submission relating to such dispute or such kinds of dispute is registered under Section 43, until such submission is lawfully revoked; or

(f) in contravention of the terms of a registered agreement, settlement or award.

(2) In cases where conciliation proceedings in regard to any industrial dispute have been completed, a lock-out relating to such dispute shall be illegal if it is commenced at any time after the expiry of two months after the completion of such proceedings.

The penalties provided for are as follows: -

Sec. 64.-(1) No employer shall dismiss or reduce any employee or punish him in any other manner by reason of the circumstances that the employee -

(a) is an officer or member of a registered union or of a qualified union or of a union which has applied for being registered or declared as a qualified union under this Act; or

(b) is entitled to the benefit of a registered agreement, submission or award; or

(c) has appeared or intends to appear as a witness or has given any evidence or intends to give evidence in a proceeding under this Act; or

(d) is an officer or member of an organization the object of which is to secure better industrial conditions; or

(e) is an officer or member of an organization which is not declared unlawful; or

(f) is a representative of employees; or

(g) has gone on or joined a strike which is not illegal under the provisions of this Act

(2) Whoever contravenes the provisions of sub-section (1) shall, on conviction, be punishable with fine which may extend to Rs. 1,000.

(3) The Court trying any offence under this section may direct that out of the fine recovered, such amount as it deems fit shall be paid to the employee concerned as compensation.

Sec. 65.—Any employer who has declared a lock-out which has been held by the Industrial Court to be illegal shall, on conviction, be punishable with fine which may extend to Rs. 2,500 and, in the case of the lock-out being continued after such conviction, with an additional fine which may extend to Rs. 200 for every day during which such lock-out continues after such conviction.

**Sec. 66.**—Any employee who has gone on strike or who joins a strike which has been held by the Industrial Court to be illegal shall, on conviction, be punishable with fine which may extend to Rs. 25, and in the case of a continuing offence with an additional fine which may extend to Rs. 1 per day for every day during which the offence continues after his last conviction for such offence, subject to a maximum of Rs. 50.

**Sec. 67.**—If any person instigates or incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which has been held to be illegal by the Industrial Court, whether such strike or lock-out has commenced or not, he shall, on conviction, be punishable with imprisonment of either description for a term which may extend to three months or with fine or with both.

**Explanation.**—For the purposes of this section, a person who contributes, collects or solicits funds for the purposes of any such strike or lock-out shall be deemed to act in furtherance thereof.

**Sec. 68.**—If a Conciliator or a member of the Board or any person present at or concerned in any conciliation proceeding wilfully discloses any information or the contents of any document in contravention of this Act he shall, on a complaint made by the party who gave the information or produced the document in such proceeding and on conviction, be punishable with fine which may extend to Rs. 1,000.

**Sec. 69.**—(1) Any employer who makes any illegal change shall, on conviction, be punishable with fine which may extend to Rs. 5,000 and in the case of a continuing offence with an additional fine which may extend to Rs. 200 per day for every day during which the offence continues after his last conviction for such offence.

(2) An employer who acts in contravention of a standing order settled under Section 26 shall, on conviction be punishable with fine which may extend to Rs. 100 and in the case of a continuing contravention of such standing order, with an additional fine which may extend to Rs. 25 per day for every day during which such contravention continues after his last conviction for such contravention.

**Sec. 70.**—Any person who wilfully refuses entry to a Labour Officer to any place which he is entitled to enter under Section 25 or who fails to produce any document which he is required to produce, or who fails to comply with any requisition or order issued to him by or under the provisions of this Act shall, on conviction, be punishable with fine which may extend to Rs. 500.

Whoever contravenes any of the provisions of this Act or of any rule made thereunder shall, on conviction, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with fine which may extend to Rs. 100 and, in the event of such person having been previously convicted of an offence under this Act or any rule made thereunder with fine which may extend to Rs. 200.

## THE PAYMENT OF WAGES ACT, 1936

This Act was passed with the primary object of remedying the grievance with regard to delays which occurred in the payment of wages to persons employed in industry and also against the practice of imposing fines upon these workmen. The matter was investigated and the material collected placed before the Royal Commission on Labour appointed in the year 1929. The Commission's Report sub-

lished in 1933, was thereafter embodied in a Bill which was circulated for eliciting public opinion and thereafter passed through the legislature. According to some writers this is almost the first legislation of its kind in India though in England a similar legislation known as "The Truck Acts", 1831, 1887 and 1896, do exist, as well as the Employers and Workmen Act, 1875 and Hosiery Manufacture (Wages) Act, 1874 and Factory and Workshop Act, 1901. The Act extends to the whole of British India including British Baluchistan and the Sonthal Parganas. It applies in the first instance to the payment of wages to persons employed in any factory and to persons employed (otherwise than in a factory) upon any railway by a railway administration or either directly or through a sub-contractor by a person fulfilling a contract with a railway administration (S. 1).

This Act will not apply to wages in respect of a wage-period, which over such wage-period, average Rs. 200 a month or more. Those employees getting Rs. 200 or more, do not fall under this Act (S. 1).

#### **What are Factories and Industrial Establishments ?**

The 'factory' under this Act has the same meaning as the definition of a factory in Section 2(j) of the Factories Act of 1934 which we have already dealt with in this chapter.

An 'industrial establishment' is defined by Section 2(ii) to mean any—

- (a) tramway or motor omnibus service;
- (b) dock, wharf or jetty;
- (c) inland steam-vessel;
- (d) mine, quarry or oil-field;
- (e) plantation;
- (f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale.

#### **What are Wages ?**

Wages are defined by Section 2(vi) to mean all remuneration capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment. They also include any bonus or other additional remuneration similar to wages which would be payable. A sum payable to a person so employed by reason of termination of his employment would also be included in the term "Wages". The following will not be included in the term 'Wages':—

- (a) the value of any house accommodation, supply of light, water, medical attendance or other amenity, or of any service excluded by



*general or special order of the Governor-General-in-Council or Local Government;*

(b) any contribution paid by the employer to any pension fund or provident fund;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(e) any gratuity payable on discharge.

### **Responsibility for Payment of Wages**

The responsibility for the payment of wages, as required by this Act, will rest on every employer and in case there are persons employed otherwise than by a contractor, in factories as managers or in industrial establishments as supervisors who are responsible to the employer for supervision and control of the industrial establishment or upon railways if the railway administration has nominated a person in this behalf for a local area, on the person or persons responsible for the regular payment of such wages (S. 3).

### **Fixation of Wage Periods**

These persons responsible are required by the Act to fix periods called wage periods in respect of which the wages are to be paid and it is provided that no wage period shall exceed one month (S. 4).

In the fixing of these periods the Act provides that the wages of persons employed in a railway, factory or industrial establishment, in which less than one thousand persons are employed, should be paid before the expiry of the seventh day and that in any other case the same shall be paid before the expiry of the tenth day after the last day of the wage period of which the wages are paid. Thus it will be seen that after the wages fall due, the period of delay cannot be more than seven days in the first case and ten days in the second case after the wages fall due. If, however, the employee's employment is terminated by the employer or on his behalf, the wages due to him must be paid before the expiry of the second working day from the day on which his employment is terminated. All payments of wages must be made on a working day (S. 5) and shall be so payable in the current coin or currency notes (S. 6).

### **Deductions from Wages**

Generally speaking the law expects under the Act that wages of an employed person shall be paid without deduction of any kind except those deductions which the Act specifically permits. Even if the wage earner is made to pay an amount to his employer it will be deemed to be a deduction from wages under this Act.

The following deductions from the wages of an employee may be made in accordance with the provisions of this Act, viz.:—

- (a) ~~fine~~;
  - (b) ~~deductions~~ for absence from duty;
  - (c) deductions for damage to or loss of goods entrusted to the employee, or for loss of money for which he is bound to account, where such damage or loss is attributable to his neglect or fault;
  - (d) deductions for house-accommodation supplied by the employer;
  - (e) deductions for amenities and services supplied by the employer authorized by the Governor-General or Local Government;
- NOTE.**—The “services” here do not include the supply of tools and raw materials required for the purposes of employment.
- (f) deductions for recovery of advances to the employee or for adjustments of over-payments to him;
  - (g) deductions of income-tax payable by the employee;
  - (h) deductions required to be made by Order of a Court or other competent authority;
  - (i) deductions for subscriptions and repayment of advances from any provident fund to which the Provident Funds Act, 1925 applies or any recognized provident fund under the Indian Income-tax Act (Section 58-A);
  - (j) deductions for payments to co-operative societies approved by the Local Government or the payment made for the scheme of insurance maintained by the Indian Post Office (S. 7).

### **Procedure for Imposing Fines**

In the case of imposition of fines the Act lays down that the employer, with the previous approval of the Local Government or any other prescribed authority, must specify the acts and omissions in respect of which the fine is to be imposed and this notice must be exhibited in the prescribed manner on the premises on which the employment is carried on; in the case of a railway it is to be exhibited at the prescribed place or places. The employee is to be given an opportunity of showing cause against the fine or any other procedure that may be prescribed for the imposition of fines and the total amount of fine which may be imposed in a single wage period on any employee must not exceed an amount equal to half an anna in the rupee of the wages payable to him within that wage period. The employee of course cannot be fined if he is under fifteen years of age. The fine is to be collected within the expiry of sixty days from the day on which it was imposed and cannot be recovered in instalments. It may be added that for this purpose the fine shall be deemed to have been imposed on the day of the act for which act or omission the employee is fined. The amount recovered in this manner shall be recorded in a register by the person responsible for payment of wages and the money realized is to be applied only to the purposes beneficial to the persons employed in the factory or establishment concerned (S. 8).

### **Deductions for Absence from Duty**

Deductions are allowed to be made on account of the absence of an employed person from his employment where he is to work

which absence may be for the whole or part of the period fixed. Deductions cannot be in a larger proportion than the period for which he was absent bears to the total period in which by the terms of his employment he was required to work. In this case the absence from work also means absence, where the employee was present, but refused to work in pursuance of a stay-in strike, or for any other cause which is not reasonable. However, subject to rules made by the Local Government, if ten or more employees acting in concert absent themselves without due notice which is required under the terms of the contracts of employment and without any reasonable cause, the deduction may include such amount not exceeding his wages for eight days as may by any such cause be due to the employer in view of due notice (S. 9).

**Deductions for damage or loss** must not exceed the amount of damage or loss caused to the employer through the neglect or fault of the employee and cannot be made until the employed person has been given an opportunity to show cause against the deduction in accordance with the procedure that may be prescribed and these deductions also have to be recorded in a register by persons responsible for the payment of wages (S. 10).

In the case of **deductions for services rendered** such as house-accommodation, amenity, etc., the said deduction must not exceed an amount equivalent to the value of the house-accommodation, amenity or service supplied (S. 11).

**Deductions for recovery of advances**, must be made from the first payment of wages in respect of a complete wage period. No recovery can be made of advances given for travelling expenses. If the employee has not earned the wages which are sought to be dealt with against advances the same will be subject to any rules made by Local Government regulating the extent to which such advances may be given and the instalments by which they may be recovered (S. 12).

**Deductions for payments to co-operative societies and insurance schemes** have to be made in accordance with the conditions laid down by the Local Government from time to time.

### **Inspectors**

The Act provides by the Inspection of Factories Act, 1934, that there shall be an Inspector for the purposes of the Payment of Wages Act. These Inspectors shall act within the local limits assigned to them and in connection with persons employed upon a railway. **The Governor-General-in-Council will appoint Inspectors.** The Inspectors have the right to visit or enter any premises at all reasonable hours and make examination of the register or document relating to the calculation or payment of wages and take such evidence as may be desirable on the spot or otherwise (S. 14).

### **Claims against Unlawful Deductions**

These claims may be made either by the Commissioner for Workmen's Compensation, appointed by the Local Government, or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate, who is authorized to hear and decide within the specified area all claims arising out of deductions or by reason of a delay in payment of wages, of persons employed or paid in that area. These claims for wrongful deductions may be made by the person on or on his behalf by his lawyer or a registered trade union authorized to so act on his behalf or by the Inspector under this Act. The application must be presented within six months from the date on which the deduction was made or the date on which the payment of wages was due to him. If the application is made after the period of six months, the same may be admitted if the applicant satisfies the authority that he had sufficient cause for not making this application in time. The employer concerned will give him an opportunity of being heard and after making such enquiries the inquiring authority may direct, order a refund to the employee out of the amount deducted and may also impose a penalty. Delayed wages may be ordered to be paid with or without penalty. Compensation may also be ordered by the authority as it may think fit, not exceeding ten times the amount deducted in the former and not exceeding Rs. 10 in case of delay in payment of wages. (Of course where the delay of payment was due to *bona fide* error, or occurrence of an emergency, or the existence of exceptional circumstances under which the person responsible for payment was unable, though diligent, to make prompt payment, or where there was a failure on the part of the employed person to apply or accept payment, no compensation shall be ordered to be paid [S. 15(3)]).

If, on the other hand, the authority concerned, after hearing the whole case, is satisfied that the application was malicious or vexatious, the authority may order a penalty not exceeding fifty rupees to be paid to the employer or the person responsible for payment of wages by the person presenting the application [S. 15(4)].

## CHAPTER XXII

### SOCIETIES REGISTRATION ACT, 1860

THIS ACT was passed to enable the registration of literary, scientific and charitable societies and to improve the legal condition of those established for the purpose.

#### Memorandum of Association

The societies to be registered have to prepare a Memorandum of Association and file it with the Registrar of Joint Stock Companies, The Memorandum has to state :—

- (1) The name of the society,
- (2) Objects for which it is formed,
- (3) Names and addresses and occupation of the governors, directors or other governing body to whom by the rules of the society the management of its affairs is entrusted.

The rules of the society are to be filed with the Memorandum of Association signed by not less than three of the members of the governing body and the Registrar will issue thereupon a certificate of registration on payment of the registration fee.

#### Societies which can be Registered under the Act

The Act specifically lays down the type of societies which can be registered under it, viz. :—

Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments or designs.

#### Alteration of the Objects

The Act provides for the alteration of the purpose or objects for which the society is formed with a view to extend or abridge them within, of course, the scope laid down by the Act. It also provides for amalgamation of such societies wholly or partially with another society. To effect this the governing body has to submit the proposition to the members of the society in writing or printed report and convene a special meeting for considering it according to the regulations of the society. Care should be taken to see that such report is delivered or sent by post to every member ten days previous to this

special meeting and the members present at such meeting must agree to this alteration by three-fifths of the votes delivered in person or by proxy and confirmed by an equal number at a second special meeting convened at an interval of one month after the former meeting (Sec. 12).

### **Suits by and Property of the Society**

The society can sue or be sued in the name of the president, chairman or principal secretary or trustees as shall be determined by its rules and regulations. If the rules are silent on the point any such person as is appointed by the governing body may sue or be sued. The property of the society is to vest in the trustees if so appointed, if not the governing body shall be taken in all proceedings, civil and criminal, as the proprietors of the property of the society for the time being (Sec. 506). The judgment obtained against the society is to be in force against the property of the society and not against the body of the personal officer sued for the society or against such person's property.

### **Dissolution of Society**

A society may be dissolved voluntarily if not less than three-fifths of the members determine that it shall be dissolved. On such dissolution all necessary steps for the disposal and settlement of the property of the society must be taken according to the rules of the society, if any, failing that as the governing body shall find expedient. If there is any difference or dispute among the members of such society in this connection the matter shall have to be referred to the principal court of original civil jurisdiction in the district in which the chief building of the society is situate. If the Government happens to be a member or contributes to or is otherwise interested in the society, the Government's consent has to be taken before dissolution of the society.

On dissolution, after paying all debts and liabilities of the society the property which remains shall not be paid or distributed among the society's members, but must be given to some other society to be determined by the votes not less than three-fifths of the members present personally or by proxy at the time of dissolution or by the court. This, of course, does not apply to a society founded or established by shareholders in the nature of a joint stock company.



## APPENDIX I

### SELECTED TEST QUESTIONS

[NOTE—The following questions have either been selected from the various examination papers, such as those for the Chartered or Certified Secretaries, Incorporated Salesmanagers (I.S.M.A.), International Accountants (A.A.I.A.), the R.A., L.C.C., D.Com. (I.M.C.), the B.Com., or the LL.B. Examinations, or have been specially drafted. These have been grouped in the order followed in the text.]

#### CHAPTER I

#### SOURCES OF INDIAN MERCANTILE LAW

1. Discuss the sources of Mercantile Law of England.
2. What was the exact position in India, as far as Mercantile Law is concerned, before the passing of the Indian Contract Act, 1872?
3. What do you understand by the expression *lex mercatoria*? Discuss fully.

#### CHAPTER II

#### AGREEMENTS

1. What are the rules relating to offer and acceptance when made by letter transmitted through the post? Explain fully the rules of offer and acceptance with examples.—(C.C.S. INT.)

2. State fully what you understand by an Agreement

3. State whether there is any contract made in the following cases :—

(1) A takes his seat in a tram car

(2) A sells his house to B for Rs 5,000

(3) A purchases at a public sale an article marked Rs. 5, and pays the amount to the cashier.

(4) A puts a penny in the slot of an automatic machine at a railway station.

4. Jones is thinking of buying Smith's car. Smith says to Jones on Monday: "I shall definitely keep my offer open to sell you the car for £150 until Thursday evening" On Thursday morning, Jones receives a letter from Smith saying that Smith has changed his mind and now wants £175. Jones rings up Smith and says that he will buy the car for £150. Is there a contract between Smith and Jones? Give reasons.—(A.I.S.M.A. INT.)

5. Your firm telegraphs to Jones: "Will you sell us your Coventry factory? Telegraph lowest cash price." Jones replies: "Lowest price for Coventry factory £5,500." Your firm telegraphs: "We agree



to buy your Coventry factory for £5,500 quoted by you." Is there a complete contract?—(A.I.S.M.A. INT.)

6. When does an "offer" and an "acceptance" sent by post become complete?—(S.COM., BOMBAY.)

7. Is actual communication to the other party essential to render effective:

(a) The acceptance of an offer.

(b) The revocation of an offer before acceptance?

Illustrate your answer by examples.—(C.C.S. INT.)

8. D writes to E a letter offering to sell E certain goods for £40 and asking E to reply by post. On receipt of the letter, E writes a reply accepting D's offer and posts it. The letter never reaches D, who after waiting three days sells the goods to F. Has E any remedy against D?—(A.A.I.A. INT.)

9. How far is actual "mental knowledge" necessary in

(a) Offer.

(b) Acceptance of an offer.

(c) Revocation of an offer?—(A.A.I.A. INT.)

10. When may an offer be revoked?

Brown filled up a proposal form for life insurance for £2,000 and sent it to the Y. Z. Company who replied that the proposal was accepted at a yearly premium of £50. However, a day later, the Company wrote that they had reconsidered the matter and that they now refused to go on with the transaction. What are the legal rights (if any) of Brown?—(C.C.S. FINAL.)

11. Can an offer be revoked in any way other than by actual communication of the notice of revocation of the offer by the proposer to the other party? Discuss fully, giving reasons.

12. When can an acceptance be revoked? A proposes, by letter, to sell a house to B at a certain price. B accepts A's proposal by a letter, sent by post. B afterwards revokes his acceptance by telegram which is received by A after the receipt of the letter of acceptance. Is there any contract? Will it make any difference to your answer if A had received revocation before the acceptance reached him?

13. Is a person bound by the terms printed on a ticket issued to him and which he has not read?

White hires an aeroplane to take himself and friends to the races. As he enters the plane the pilot hands him a ticket whereby the owners of the plane undertake no liability for the safety of the passengers carried. The plane crashed through the negligence of the pilot and White and Black (one of his guests) are injured. Have Black and White any right of action against the owner of the plane?—(C.C.S. INT.)

### CHAPTER III

### CONTRACTS

1. A contract is defined as "an agreement enforceable by law." Discuss this definition fully. What do you mean by "agreement"? On what does enforceability depend?—(S.COM., BOMBAY.)

2. "A mere mental acceptance not evidenced by words or conduct is in the eye of the law no acceptance." Comment on this statement.

3. The XYZ Company, London advertised an offer to the public to pay £100 to any individual who used their Inhalent "the finest the world has ever known" and contracted a cold within a fortnight after use. B bought and used a bottle but within three days was in bed with a streaming cold. The Company has refused to pay him his £100 alleging that the offer was an "obvious bluff." What are B's legal rights?—(C.C.S. INT.)

4. State briefly the elements necessary to constitute a simple contract so as to be legally binding

Jones writes to Smith offering to sell him his house for £1,000 and giving him three days in which to decide. Before the three days are up, Jones sells the house to Brown. Smith hearing of this from an outside source, accepts Jones' offer within the three days and claims performance of the contract. What is the legal position as between Jones, Smith and Brown?

5. What are the essentials in a contract? Is there a contract in either or both the following cases:—(a) A sees an article marked "Price 5" in B's shop. A tells B he will buy it and offers him 5. B says it is not for sale. (b) C receives from D, a second-hand book-seller, his monthly catalogue of second-hand books for sale at specified prices. C writes to D saying he will buy one of the books mentioned at the price named in the catalogue.—(C.C.S. FINAL.)

6. A and B walk into X's shop. Both ask to be supplied with goods on credit. A falsely represents that he has a large income. B falsely represents that he is acting as agent for Y who has authorized him to order and take delivery of goods. X supplies the goods to A and B who each sell to Q and abscond with the money. X claims the goods from Q. Advise Q as to his position.—(S.COM., BOMBAY.)

7. A made an offer of goods to B conditional on receiving an answer by return of post. A misdirected the letter which was consequently delayed in transmission. On receiving the letter, B wrote accepting the offer by return of post. Meantime A had sold the goods to another person. State whether B has any legal remedy against A.

8. Under what circumstances is an infant bound on his contract for necessaries? Is he liable upon a bill of exchange which he has accepted in payment for necessaries?

9. What protection is afforded to minors by the Indian Contract Act? Does a minor by his conduct lose his protection?—(S.COM., BOMBAY.)

10. On the 1st of June, 1933, A, who was then a minor, executed a simple bond for Rs. 100 bearing interest at 6% per annum, in favour of B. On the 15th of May, 1938, by which date A had become of age, A executed a fresh bond for Rs. 125 which recited and represented the Rs. 100 which had been borrowed on the previous bond and Rs. 25 in settlement of the interest accrued due thereon. On the 10th of January, 1939, B files a suit against A on the second bond to recover the moneys due thereunder. Will B succeed?—(S.COM., I.M.C.)

11. Can a promise by a person on attaining majority to repay money lent and advanced to him during his minority be enforced?—(I.L.B., BOMBAY.)

12. An infant fraudulently represented to moneylenders that he was of full age, and obtained a loan of £400. Have the moneylenders

any right of action against the infant for the money lent, or for damages for fraudulent misrepresentation?—(L.C.C.)

13. How far, if at all, can an infant bind himself by a contract of sale? Can an action be brought (a) against an infant seller for breach of contract by delivering goods of an inferior quality, (b) against an infant buyer for the price of goods bargained and sold?—(C.C.S. INT.)

14. Are the following, made by A, aged 20 (in England) or 17 (in India), binding on him:—

(a) A contract of apprenticeship.

(b) A contract for a suit price £7.

(c) A contract to take a lease for one year of a flat?

—(A.A.J.A. INT.)

15. State the provisions of Law relating to contracts entered into with a lunatic (1) with notice of lunacy; (2) without notice of lunacy.

\* 16. Distinguish between void and voidable contracts. What contracts are illegal at Common Law?—(M.COM., CALCUTTA.)

17. A purchased certain goods from B and when sued for the price set up the defence that he was drunk at the time of entering into the contract. What must A prove to escape liability?

18. In what circumstances is a contract entered into by (a) person of unsound mind, (b) a drunken person unenforceable against him?

—(L.C.C.)

19. (i) A being ignorant of the fact that a plot of land of which he is owner contains valuable minerals, contracts in writing to sell it to B for a price greatly below its real value. Can B, who knows of the valuable minerals, enforce the contract?

(ii) Would your answer differ if A was drunk when he made the contract?—(A.A.J.A.)

20. Discuss the legal contractual capacities of (1) an alien, (2) an alien enemy, and (3) a convict.

21. Can a Barrister enter into valid contracts and be sued for the price of goods supplied to him? Can a Barrister successfully sue his clients for the non-payment of his professional fees?

22. A foreign sovereign enters into a contract with a British subject in British India. Can he enforce his contract against the British subject? Can the contract be enforced against him by the British subject in British Courts?

23. Can a married woman enter into a valid contract and can a judgment be obtained against her personally for the non-performance by her of her part of the contract?

24. What is the liability of a married woman on a contract made by her during the marriage?—(A.A.J.A. INT.)

25. What authority has a wife living with her husband to pledge his credit? How can this presumption of authority be rebutted?

Mrs. X has been in the habit of ordering from Bantocks, Limited, dresses for herself and the children for which Mr. X has hitherto paid. He now tells her that he will not pay the account in future, but she continues to order dresses. Advise Bantocks whether they can make Mr. X liable for their bill.

26. A married woman orders goods from her milliner. By what authority and to what extent is she liable for the price of such goods apart from any question of her husband's liability?—(C.A.)

27. (a) In what ways may a husband rebut the presumption that his wife is entitled to pledge his credit?

(b) A husband forbade his wife to pledge his credit, but did not provide her with necessaries. She, notwithstanding the prohibition, incurred debts in his name for goods for herself and her household. Could the sellers recover against the husband?—(L.C.C.)

28. Define a "Corporation." In what manner can a corporation enter into valid contracts? Is the common seal of the corporation always necessary on every contract it makes?

29. How do corporations enter into contracts and with what formalities?

The Clerk to the Beechwood U.D.C. entered into a contract with X and Co., for the supply of a quantity of gravel for road-making, the price being £100. The gravel was supplied and used, but the Council are dissatisfied and disclaim liability. Can they do so, and, if so, upon what ground? Would your answer be the same if the liability was for £25?

30. Can (a) a contract under seal, or (b) a contract in writing be discharged or varied by a verbal agreement? What is the law in reference to contracts in restraint of trade?—(C.C.S. INT.)

31. An agreement is not properly stamped; what is the position of the party seeking to enforce it? What contracts must be under seal?—(C.C.S. INT.)

32. A lets his furnished flat to B as a monthly tenant at Rs. 100 a month, B falsely representing that she was a milliner. At the end of the first month A learnt that B was not a milliner but that she had kept the flat for immoral purposes. A allowed B to occupy the flat for one month more at the end of which B vacated but paid no rent. A filed a suit against B to recover Rs. 200 due to him for two months' rent. Will A succeed in his claim or any part thereof?—(L.L.B.)

33. A hired B's rooms for a series of lectures. B discovered that the lectures would be of a seditious nature and declined to allow A to use the rooms. Discuss B's prospects in litigation.—(S.COM., CALCUTTA.)

34. State whether the following agreements are void or valid. Give your reasons in each case:—

(1) A promises to pay a certain sum of money to B, who is an intended witness in a suit against A, in consideration of B's absencing himself at the trial.

(2) In a suit by A against B for the recovery of Rs. 2,000, A is in need of money. C agrees to provide funds to A in consideration of sharing half the money recovered from B.

(3) A promises B, in consideration of Rs. 1,000, never to marry throughout his life.

(4) A promises B, in consideration of Rs. 1,000, never to marry a particular individual.

35. Where one of the parties to a contract dies, what in general are the legal rights of the other party?—(A.A.L.A. INT.)

56. A promised to give B Rs. 500 as a birthday present, on B's birthday; A failed to carry out his promise. B sued A for the amount. Decide the suit.—(I.L.B.)

57. A writes to B, "At the risk of your own life you saved me from a serious motor accident. I promise to pay you Rs. 10,000." A does not pay B. Advise B as to his legal rights.—(S.COM., CALCUTTA.)

58. What is meant by suing on quantum meruit?—(S.COM., CALCUTTA.)

59. What is Ratification? How far is knowledge of facts required for ratification?—(S.COM., BOMBAY.)

60. A owed B Rs. 150, and B promised A that he would forgive him (A) the rest of the debt if he would at once pay him Rs. 50. A paid Rs. 50. B afterwards brought an action against A for the recovery of the balance. Will B succeed? Discuss the position from the point of view of both the Indian and English Laws.

61. Explain: (i) 'Consent', (ii) 'Coercion', and (iii) 'Undue influence'.—(D.COM., I.M.C.)

62. A misappropriated money entrusted to him by B. B threatened A's wife that he would prosecute A unless she agreed to enter into a contract with B to make good, out of her own property, the amount of defalcation. Mrs A agreed to do so in writing on the express terms that there should be no prosecution on the part of B. Can the contract be enforced against Mrs. A?

63. Explain shortly the meaning of the following terms:—(a) Duress, (b) undue influence, (c) misrepresentation.

64. State (i) elements of 'fraud' and (ii) distinguish 'fraud' from 'misrepresentation'.—(D.COM., I.M.C.)

65. Who are competent to contract? An 'incompetent' person represents to the other party at the time of entering into the contract that he is a 'competent' person and thereby induces the other party to enter into a contract. Can he thereafter successfully plead that the contract is not binding on him?—(D.COM., I.M.C.)

66. C, with the intention of inducing D to enter into a contract with him, makes a statement to D, which is in fact untrue, and thereby induces D to enter into the contract. What are D's rights, if the statement is made by C—

(a) knowing that it was untrue;

(b) recklessly, without caring to know whether it was true or false;

(c) in good faith, but negligently;

(d) in good faith and without negligence?—(I.L.B.)

67. A brings an action against B for recovery of damages suffered by him in respect of fraudulent misrepresentations made by B on the sale of certain goods to A. What elements must necessarily exist in the representations so made in order to enable A to succeed in his action?—(C.A.)

68. Is it a valid defence in an action for breach of contract that the defendant has made a mistake in signing the contract? Give some cases in which a mistake can be pleaded with success to set aside a contract. State also, on what, in your opinion, the policy of law is

69. (i) In what circumstances does mistake avoid a contract or prevent a contract from arising?

(4) You have agreed to sell Robinson a certain camera. Robinson thought that it was a new camera; in fact, it was second-hand. You thought Robinson appreciated that it was second-hand. Can Robinson avoid the contract?—(A.J.S.M.A. INT.)

70. A contracts with B, a bookseller, to buy a book second-hand, believing it to be a valuable first edition, whereas in fact it is a third edition of little value. B knows that A is mistaken and takes no steps to correct the error. Is A bound by the contract?—(A.A.I.A. INT.)

71. What exceptions are there to the rule that it is not necessary for a party who is negotiating for a contract to disclose everything which may affect the other's judgment as to whether he will enter into it?

72. What remedy has a person who is induced to enter into a contract by innocent misrepresentation?—(L.C.C.)

73. What are rights of a person who has been induced to enter into a contract by fraudulent misrepresentation of the other party?  
—(A.A.I.A. FINAL.)

74. What are the essential elements in an action for damages for Deceit?

A, who is trying to sell an unsound horse, forges a veterinary certificate stating the horse to be sound, and pins it on the stable door. B comes to see the horse but does not notice the certificate. He buys the horse at a high price. Can he recover from A if the horse subsequently goes lame?

75. A goes to an auction and by his own carelessness, and without any fault on the part of the auctioneer, bids for one lot, intending to bid for a different lot. Is A bound by his contract to take up and pay for the lot he does not want?

76. If A pays money to B believing him to be C, can A recover the money from B on discovering his mistake?

77. H wished to buy old oats. S showed him a sample of new oats and H, mistakenly thinking the oats were old, agreed to buy. S knew that H was making this mistake, but said nothing. H refused to pay for the oats. Could S recover the price?—(L.C.C.)

78. X agrees to sell to Y, specific cargo of goods, supposed to be on its way from Japan to Calcutta. It turns out that, before the day of the bargain, the ship carrying the cargo had been cast away and the goods lost. Discuss the rights and liabilities of both X and Y under the circumstances.—(U.L.S.)

79. What is the effect under the Indian Contract Act of impossibility of performance arising after a contract is made? In what respect does the English law differ from the Indian law on the subject?  
—(U.L.S.)

80. On 1st January A passes a writing to B agreeing to supply coal to B accordingly to B's orders from time to time, for a period of 12 months, at a certain price and upto a maximum of 100 tons. B writes at the foot of the writing:—"I agree." After the delivery of 50 tons, A writes to B on 1st June, acknowledging B's further order for 10 tons but stating that on account of a very considerable rise in the market, A would not execute the order for 10 tons or any other order that may

be sent by B thereafter, unless a higher price than that stipulated is paid. Discuss the legal rights of the parties.—(LL.B., BOMBAY.)

81. H agreed to hire the use of K's rooms on the days of June 26th and 27th for the purpose of seeing the intended Coronation procession, and paid to K £10 as deposit. By reason of the King's illness no procession took place on either of those days. K sued H to recover the balance of the agreed rent. What are the rights and liabilities of H and K, having regard to the provisions of the Indian Contract Act?

—(LL.B., BOMBAY.)

82. How are the liabilities of the parties to a contract affected by subsequent impossibility?

A let to B a furnished bungalow for three months from July 1. The keys were handed over to B on June 30 with a notice to the effect that the house was ready for occupation. On July 4 B, who had been travelling by car with his wife and family, on arriving at the bungalow discovered that owing to the bursting of a dam on July 3, the house was flooded up to the first floor window-sills. The dam was not the property of A, who was not responsible for the bursting and subsequent flooding. B has paid the whole rent in advance. Consider B's rights, if any, to a return of rent.

83. When is it a defence for a defendant such as for breach of contract to prove that it was impossible for him to perform his promise?—(C.C.S., r.)

84. X agreed to let his theatre to Y for a show in connection with the Mayor's Fund. Before the date of the entertainment the hall was destroyed by accidental fire. Advise the parties.—(B.COM., CALCUTTA.)

85. A has contracted to marry B in two years' time. Shortly after the contract he breaks off the engagement without B's consent. B writes repeatedly begging him to adhere to his contract. Just before the expiration of the two years a change in the law makes it illegal for A to marry B. B on the expiration of the two years sues A for breach of promise. Advise A.—(LL.B., BOMBAY.)

86. Supposing A owes B three debts, one for £195, dated 5th January 1914, another for £50, dated 1st February 1915, and the third for £20, dated 5th May 1916. A sends a cheque for £50 to B on 5th January 1917. B wants to appropriate this amount to the debt of 5th January 1914. Can he do so? Discuss fully.

87. What do you understand by "Novation"? Give an example.

88. What is meant by "merger" of a contract? In what cases does it occur?—(L.C.C.)

89. What elements are essential to make a contract a contingent one?

90. Are the following contracts Contingent contracts? How will you decide them?

(a) A agrees to pay B Rs. 500, if C passes his LL.B. Examination in 1918. C passes his examination in 1918.

(b) A agrees to pay B Rs. 500 if s.s. *Orlando* does not return within a year. The ship is sunk within the year.

(c) A agrees to pay B Rs. 500 if B will marry his own daughter to C. C was dead at the time of agreement.

91. During his wife's lifetime F promised to marry G when his wife was dead.

The wife died and F refused to marry G. Advise G whether she has any remedy.

81. D falsely pretends to E that D is a bachelor and persuades E to engage himself to be his wife. D is in fact already married. Has E any remedy when she discovers the truth?—(C.C.S. FINAL.)

82. State the various modes in which a contract may be discharged—(L.L.B.)

83. The defendant advertised that he had engaged Miss Maud Allan to perform for a week commencing on 1st December 1913, at the Royal Opera House, Bombay. The plaintiff took 20 seats from the defendant for the night of the 2nd December paying for all the seats except two. Miss Allan sprained her ankle on the night of the 1st December and was compelled to abandon her engagement with the defendant. The plaintiff brings a suit to recover the money paid by him. The defendant, while denying his liability, counter-claims for the price of the remaining two seats taken by the plaintiff. How will you decide the suit?—(L.L.B.)

84. C engaged D to sing at his theatre on 1st November 1911 for Rs. 500. D is prevented from performing—

- (a) by an accident to his taxi-cab on his way to the theatre;
- (b) by a sudden illness caused by an indiscretion in diet,
- (c) by C's theatre being burnt down on the evening of 1st November;
- (d) because D subsequently accepted another engagement to sing for E.

Has C or D any, and what right of action in any of these events and against whom?—(L.L.B.)

85. Briefly discuss the rights and liabilities of parties to a contract consisting of reciprocal promises. A contracts to deliver to B on 1st January 1914, 100 bales of cotton, payment to be made on delivery. On 5th December 1913, A informs B that he will not be able to carry out his contract. Advise B as to his rights. —(L.L.B.)

86. What is "a promise"? What part does it play in the making of a Contract?

What is the law relating to performance of reciprocal promises?

87. What are consequences of a breach of contract?

88. A writes to his friend B in London and invites him to come and play on A's side in amateur club cricket in Yorkshire. B having written to accept the invitation travels up to Yorkshire at his own expense and pays his own hotel bill and duly presents himself at the cricket ground but A refuses to find him a place on the side. Has A committed a breach of contract?—(C.C.S. INT.)

89. What principles are applied in order to assess the amount of damages recoverable for a breach of contract?—(A.A.J.A. INT.)

90. When in a contract it was agreed that a certain sum of money shall be paid if one of the parties commits a breach of his agreement, is such party in default always liable to pay the sum named? X, a retail tradesman, buys soap from Y and agrees to retail the soap at not less than 8d. a cake. X further agrees that in respect of any cake he sells at less than 6d. he will pay Y £50. X sells ten cakes at 5½d. Y sues him for £500. Will Y succeed, give reasons for your answer.—(C.C.S. FINAL.)



101. The defendants having contracted to supply the plaintiffs' steamship with a propeller, shaft and other fittings, supplied useless fittings, whereby the plaintiffs, besides being obliged to replace the fittings lost the use of the ship for 9 days. What damages are the plaintiffs entitled to claim against the defendants?—(L.L.B.)

102. A contract is made between X and Y. In what cases and subject to what conditions may the benefit under the contract be assigned by X to Z?—(A.A.I.A. INT.)

103. What is an equitable assignment of a debt or other chose in action? What form may it take?—(L.C.C.)

104. What is a contingent contract? A agrees to sell to B 10 packages of certain goods of January 1919 shipment *on their arrival in* Bombay from Japan. No goods of January shipment arrived in Bombay, but similar goods of February shipment arrived in Bombay. What are B's rights?

105. If A owes more than one debt to B, and makes a payment not sufficient to satisfy the whole amount due, how is the money paid to be appropriated? Can an appropriation once made be changed? If so, under what circumstances?

106. D was indebted to C in (a) a statute-barred debt, (b) a sum of money lent, (c) a debt based on an illegal consideration, (d) a sum for which X also was jointly liable. D paid a sum to C without appropriating it to any particular debt. To which of the debts could C appropriate the payment? When could he appropriate? After once appropriating it, could he change the appropriation?—(L.C.C.)

107. In what cases is an agreement said to be illegal or unlawful? Is an agreement by way of wager unlawful?

108. What do you understand by anticipatory breach of contract? Discuss the consequences of such breach on the rights and liabilities of the parties.

A, a chemist in Bombay, agreed to supply B with 100 bottles of a certain drug in January 1929. In October 1928 A wrote to B that he would not carry out his contract. B remained silent. In December 1928 a law was passed prohibiting the sale of the said drug. B seeks your advice in February 1929. What are his rights? Would it have made any difference if B sought your advice in November 1928?—(B.COM., BOMBAY.)

109. Your firm enters into similar contracts with Thomas and with James, two carpenters, that each shall construct and fit 150 A.R.P. shutters to the 300 windows of your factory; each is to receive £15, your firm to supply all materials.

Thomas, having completed 100 shutters, goes off to another job and does not return. When James has completed 100 shutters, you run out of wood and cannot obtain any more for three weeks, during which James is called up. The unfinished work is subsequently completed by another carpenter.

Thomas and James each send in a bill for £10 in respect of work actually done. Advise your firm, with reasons, whether these bills must be paid.—(A.I.S.M.A. INT.)

110. Your firm contracts with Williams to sell him for £6 30 model belts to be selected from the remainder of your last season's stock. It is agreed that you will deliver the belts the next day. You pick out 30 belts and deliver them as arranged. Williams subsequently

rings up and says that he does not like 12 of the beits and wishes to exchange them. Advise your firm whether Williams has the right to do so.

111. B, who was in wrongful possession of land which by right belonged to K, collected rents and paid the Government revenue. K eventually established her title to the property, obtained possession, and recovered the rent from the tenants and B was obliged to refund the same. Subsequently B sued to recover the sum which he had paid on account of revenue. How would you decide the suit?—(LL.B.)

112. A, a tradesman, sends some goods to B, but the carrier leaves them at C's house by mistake. C treats the goods as his own. Is C bound to pay?

## CHAPTER IV

### BAILMENT

1. Set out the general principles of bailment.
2. Explain what a bailment means, and discuss the rights and liabilities of a bailor and bailee.
3. What is the standard of care required of a bailee in respect of the goods bailed to him?—(LL.B.)
4. Is it the duty of the bailor to disclose faults in goods bailed with another person? A hires a cycle from B. The cycle is unsafe but B is not aware of it and A is injured. Is B responsible to A for the injury?
5. What are the rights of a bailor against a bailee when the latter mixes his own goods with those bailed with him?—(LL.B.)
6. Decide the following cases:—
  - (1) B agreed to buy a car from A if his solicitor approved of it. He obtained possession of the car and sold the car to C. The solicitor subsequently disapproved of the transaction. A wants to recover the car from C.
  - (2) The plaintiff who wanted to attend a cinema left his car in the defendant's grounds after having paid a shilling and obtained a "car park ticket". He returned from the cinema and found that the car had been stolen by some one. The plaintiff sues the defendant as bailee for negligence.
- (R.A. FINAL.)
7. A leaves a cow in the custody of B for 3 years. The cow has a calf at the end of the period. Is B bound to deliver the calf as well as the cow or should he deliver the cow only?
8. How is a bailment terminated? Has the bailee any right to exercise lien on the goods bailed for the payment of the remuneration for his services, labour or skill exercised by him on goods bailed with him?
9. Cite some examples in which bailees have a general lien and also some examples where they have a particular lien in respect of goods bailed with them.

## CHAPTER V

## PLEDGE

1. (a) Distinguish between a "Bailment" and a "Pledge".  
 (b) A hires a carriage of B. The carriage is unsafe, but B is unaware of it. A is injured while driving in the carriage and sues B for damages. Decide the case.—(D.COM. I.M.C.)
2. Describe and distinguish between hypothecation, lien and pledge.  
 —(D.COM. I.M.C.)
3. What are the rights of a pawnee, when the pawnor makes default in payment of the debt?—(LL.B., BOMBAY.)
4. Define "Pledge" and give the respective rights and duties of Pawnor and Pawnee.—(LL.B.)
5. A, wife of B, pledged certain ornaments, exclusively belonging to B, but which were in A's charge, to C by depositing them with C who had no reason to suppose that they were not A's property or that they were merely in A's charge for wearing them only. The pledge was effected without the knowledge of B. After A's death, when D came to know of the pledge he sued C for the recovery of the ornaments or for their prices. Can he succeed and, if so, will he have to pay back the amounts for which A had pledged the ornaments?—(LL.B.)
6. Distinguish between a pledge and mortgage of goods with special reference to the remedies of the pledgee and the mortgagee.

## CHAPTER VI

## SALE OF GOODS

1. Explain and distinguish the following terms:—A sale; an agreement to sell; gift; barter and bailment.
2. What are the provisions of -  
 (a) Section 4 of the Statute of Frauds,  
 (b) Section 4 of the Sale of Goods Act?—(A.A.L.A. INT.)
3. What statutory restrictions are there upon the right to enforce a contract for the sale of goods of the value of £10 or upwards?
4. "Under Section 4 of the Statute of Frauds certain contracts are unenforceable unless evidenced by a sufficient memorandum in writing." What are the contracts in question, and what constitutes a "sufficient memorandum in writing"?—(A.A.L.A. INT.)
5. To what contracts does Section 4 of the Statute of Frauds now apply? Are the following contracts within it?  
 (a) A agrees with B in October 1940 to employ him for two years from that date subject to the rights of either party to give at any time after 1st January 1941 six months' notice in writing to terminate the contract.  
 (b) In consideration of B's acceptance of a Bill of Exchange drawn on B by C payable three months after date, A promises to provide B with funds to meet it when it falls due.

Explain the reasons for your answer.—(C.C.S. FINAL.)

6. What conditions and warranties are implied in hire-purchase agreements under the 1938 Act?—(A.I.S.M.A. INT.)

7. Distinguish "Hire-purchase" from "deferred payment sale". What are the rights of third parties either of these cases if the goods are purchased by such third parties?

8. X, a dealer in musical instruments, agreed to let a piano on hire to Y, U to pay a rent by monthly instalments, on the terms that Y might terminate the hiring by delivering up the piano to X, Y remaining liable for all arrears of hire; also that if Y should punctually pay all the monthly instalments, the piano should become his property and that until such full payment the piano should continue the sole property of X, Y to recover the piano from the money-lender. Advise X.—(H.A. FINAL EXAM.)

9. X agreed to take a correspondence course of instruction from the Wye College for £12, payable by monthly instalments of £1 each. After the first month he gave notice abandoning the course. Advise the College as to the various courses open to them in suing X for their fees.

10. Explain and illustrate how a sale of ascertained goods is effected and when does such a sale become complete so as to pass the property in the goods to the buyer?

11. B offers to buy A's horse for 500 rupees. A accepts B's offer. Before A can deliver the horse, the horse dies. Who is to bear the loss?—(B.COM., BOMBAY.)

12. What is meant by unascertained goods? In a contract for the sale of goods, state when (a) the property, (b) the risk, in the goods sold pass from the seller to the buyer.—(INC. ACCTT.)

13. M, a timber merchant, agreed to buy from one S, the trunks of certain teak trees belonging to S. He marked out the timber he wanted and paid for it, and it only remained for S to sever the parts not wanted and send the rest to the purchaser. Just then, S becomes insolvent. M filed a suit against the Official Assignee to obtain delivery of timber bought by him. Will he succeed?—(L.L.B.)

14. A bought 20 hogsheds of sugar out of a lot of sugar in bulk belonging to B. Four hogsheds were filled up and delivered, sixteen other hogsheds were then filled up and appropriated to the contract by the seller who gave notice to the buyer to take them away which the latter promised to do. Before A could remove them, a fire broke out in B's warehouse and the sacks were destroyed. What are the rights of the parties?—(L.L.B.)

15. Outline the rules in the Sale of Goods Act, 1893 which determine when the property in goods passes from the seller to the buyer. (A.A.I.A. INT.)

16. What are "ascertained" and "unascertained goods"? How is a sale of goods effectively made? What part does "delivery" play in it?

17. How should the price be tendered so as to be a legal tender? A owes B Rs. 3-6-9 for goods bought; he tenders a five-rupee note. Is the tender good?

18. On a sale of goods it is agreed that the price shall be fixed by the valuation of a third party. If the third party is prevented from making the valuation by the act of one of the contracting parties,

what is the result—(a) on the contract generally; (b) so far as goods have been already delivered to the buyer?—(C.A.)

19. When may the seller sue for the price of the goods? Can he do so in the following cases:—

(a) Sale of goods f.o.b. Liverpool shipment last week in January. The seller has the goods ready for shipment, but the buyer fails to name a ship so that goods are still on the quay in February.

(b) Sale of goods to be paid for net cash against documents. The seller tenders the documents but the buyer refuses to take them up.—(C.C.S. FINAL.)

20. (a) In a contract for the sale of goods, how is the price ascertained?

(b) What is the legal position if a wholesaler sells goods to a retailer with a condition that they shall not be retailed under a specific price?

21. Can an agent of the seller receive payment? A owes B Rs. 100 for goods bought. He meets a clerk of B's shop in the street and pays him Rs. 100. The clerk runs away and B demands payment. Can A successfully resist the demand?

22. A employs B, a broker, to buy hemp. At A's request the hemp is left at B's wharf. B, acting without instructions from A, sells the hemp to C. Can C enforce the contract, if A afterwards refuses to complete on the ground that B has sold without his authority?

23. A, a thief, sells to B goods stolen from S. Does B require a good title to the goods? Can S claim the goods from B?

✓24. What are the chief duties of a seller of goods? Is a seller bound to send the goods to the purchaser?

25. A, a merchant, bought sugar by sample to be delivered per rail to his shop. Sugar was tendered at his shop in intended execution of the contract; but when A opened and examined a bag, he found that it was not according to sample. He sold four bags and returned the rest to the seller. Advise the seller and A as to their rights.—(LL.B.)

✓26. What conditions are implied in a contract of sale of goods by description?—(A.A.I.A. INT.)

27. A, who owns the village general store, makes three consecutive sales as follows:—

(1) Customer B says: "Can you sell me a material for black-out curtains?" A sells him one of his current lines, made by manufacturer C.

(2) Customer D asks for a food suitable for a month-old puppy. A sells him  $\frac{1}{2}$  lb. (which he takes from an open sack) of a food prepared by manufacturer E.

(3) Customer F wants peas. A says: "I have no fresh ones, but here are some canned ones—made by G, a very good make." F takes them.

The curtains turn out to be insufficiently opaque, and B has to scrap them. The food is unsuitable for a young puppy, and the puppy dies as the result of eating it. The canned peas contain an injurious chemical which entered the tin in the manufacturer's canning room, and F's family is seriously ill.

State with reasons, whether B, D and F have any right of action against (1) A, (2) manufacturers C, E and G respectively.

—(A.I.S.M.A. INT.)

28. What is meant by and what is the effect of the seller "reserving the right of disposal"? How ought a seller who ships goods to act if he desires to reserve the right of disposal?—(C.C.S. FINAL.)

29. (a) In a sale of goods, in what circumstances is the buyer deemed to have accepted the goods?

(b) State (with comments) in which, if any, of the following cases the buyer has accepted the goods:—

(1) Buyer initials three parcels of which he has not examined contents, and leaves parcels with vendor for collection later;

(2) Buyer inspects goods, and writes on advice note: "Not according to description. Rejected";

(3) Buyer takes sample from goods delivered, and after examining it, says that the goods are not equal to sample and that he rejects them—(A.I.S.M.A. INT.)

30. Explain the nature of "Bought Note" and "Sold Note."

31. What is "a condition precedent" and "an implied warranty"? Explain the terms F.O.B., F.O.R., C.I.F.

32. Explain the terms of a "C.I.F." contract.—(B.COM., I.M.C.)

33. What are the powers and duties of a Common Carrier? Mention the usual contracts for the carriage of goods in ships. Has the shipowner a lien for freight?—(C.C.S. FINAL.)

34. Define delivery. In what way may delivery of goods be effected when they are (a) at sea; (b) in the hands of a warehouseman on land.—(C.C.S. FINAL.)

35. A sells goods to B. Subsequently A neglects to deliver the goods to B in accordance with the contract. Upon what principles and at what period is the measure of damages to be ascertained?—(INC., ACCT.)

36. Plaintiff handed goods to a carrier to be delivered to exercise his right of stoppage and instructed the carrier not to deliver. The carrier, notwithstanding this, in error delivered them. Plaintiff sued the consignee but failed to recover the price. Could he sue the carrier?—(L.C.C.)

37. Distinguish between "Earnest Money" and "Part Payment".

38. What do you understand by the seller's lien? Can it be exercised when the time for payment is fixed at a future date?—(B.COM., BOMBAY.)

39. What is "a Lien"? State the different kinds of "Liens" you know of.

40. What is meant by the seller's right of stoppage in transit? Show how it differs from seller's lien.

How is the seller's right in this respect affected if (a) the buyer obtains delivery before the arrival of the goods at their destination? (b) The goods are delivered to ship chartered by the buyer?

41. What is 'stoppage in transit'? What are the rights of a seller with regard to goods in transit?—(B.COM., BOMBAY.)

42. Briefly explain the rights of an Unpaid Seller of goods. Under what circumstances can he exercise a right of resale?—(B.A. FINAL.)

43. A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months B becomes insolvent, and Official Assignee demands delivery of the sugar from A without offering to pay the price. Is A entitled to retain the goods for the price?

44. A sells and consigns goods to B of the value of Rs. 12,000. B assigns the R/R of the goods to C to secure a specific advance of Rs. 5,000, made to him upon the R/R by C. B becomes insolvent, being indebted to C to the amount of Rs. 9,000. Can A stop goods in transit? Give reasons?—(L.L.B.)

45. What is the liability of a common carrier for loss or injury to goods (a) in transit, (b) remaining in his custody after arrival at their destination?—(INC. ACCTT.)

46. What liability, if any, does a railway company incur in carrying a passenger's luggage? Whose agent is the railway porter when he carried the luggage to the train, and places it in the van, or in the carriage with the passenger?

47. Railway companies entrusted with carriage of goods from one place to another are considered to be bailees with certain liabilities. Discuss this proposition briefly.—(R.A., FINAL.)

48. What are "Risk Notes"? Explain their function.—(R.A., FINAL.)

49. X sends a parcel of silk, valued at £40, by rail to Y. What liability, if any, will the railway company incur if the goods are lost in transit? Will it affect your answer if it is proved that the parcel has been stolen by one of the Company's servants?

50. When can a seller of goods exercise his rights of resale? How does the right to resell affect the measure of damages? Is there any distinction between statutory power of resale and that reserved to a seller under the ordinary contract of "indent"?—(L.L.B.)

51. What is market overt? Is there any, and if so what, difference in English and Indian Law, as regards the effect of a sale in market overt?

52. A steals a watch from B and by false pretensions obtains a diamond ring from C. He sells the watch to D, a London jeweller, and the ring to E, a London tobacconist. Have either D or E a good title to the articles in question? If D or E sold them to F, would F have a good title? Give reasons for your answer.—(INC. ACCTT.)

53. (a) Explain: (i) 'Delivery', (ii) 'Business' and (iii) Third Party.

(b) What do you understand by 'a Document of title'?

What part does it play in mercantile transactions?—(B.COM., I.M.C.)

54. Explain: (a) "Seller's lien", (b) "Warrantee", (c) "consequences of a breach of warranty."

55. What is the distinction between a Warranty and a Condition on the Sale of goods? How does a Warranty differ from a mere expression of opinion?—(L.C.C.)

56. Define Warranty and Condition. In what cases may a buyer of goods treat the breach of a condition as a breach of warranty?

—(R.A., FINAL.)

57. Is any warranty implied in a contract for sale of goods by sample?

A contracts to sell B Java sugar to agree with a sample which he produces. The sugar when delivered agrees with the sample, but neither of them is Java sugar. What are B's rights?—(L.L.B., BOMBAY.)

58. Distinguish between a condition and a warranty in a contract of sale of goods.

What remedies are open to a purchaser on breach of a condition and a warranty?—(S.COM., BOMBAY.)

59. X sells a quantity of soya beans to Y by sample. What conditions are implied on the sale? What remedies are open to X, if Y refuses to accept and pay for the beans?

60. A authorizes B, his servant, to sell his horse at the best price he can obtain, saying nothing about giving any warranty. B sells the horse to C, warranting that the horse is sound. As a matter of fact, the horse is not sound. Has C any, and if so what, remedy?—(L.L.B.)

61. What is the effect of a breach of warranty—

(a) Where a specific article is sold with a warranty;

(b) Where there is a contract, with a warranty for the sale of unascertained goods?

62. When goods are delivered to the buyer on approval when does the property therein pass to the buyer? A sends B a gas-meter on approval in March 1911; after a trial B returns it in November 1911. Can A successfully sue B for the price?—(L.L.B.)

63. When does the property in goods pass to the buyer in the case of a delivery of goods "on sale or return"?

64. State concisely the rules in accordance with which damages for breach of a contract should be assessed.—(C.A.)

65. (a) Explain the maxim "*Caveat emptor*" (Let the buyer beware) and its application to a sale of goods. What are the exceptions to it? State how far it is recognized by the Indian Contract Act.

(b) A orders two suits, one gray, the other brown. A is not satisfied about the fit when they are ready. He puts on the gray one, goes out for a short walk and tells the tailor, "I will return both suits tomorrow." A returns the gray suit as promised, but continues to use and partially soils the brown one. After a month he attempts to return the latter. The tailor refuses to accept it and sends in his bill. Discuss the rights of the parties.—(S.COM., BOMBAY.)

66. Explain the rule of "*Caveat emptor*" and state the exceptions thereto.

Jack Sprat orders from his grocer "1 lb. of Danish bacon and a tin of Tiddler's sardines." He eats some of the bacon and his wife eats some of the sardines. As a result both are poisoned and spend a week in a nursing home. Can he sue his grocer?

67. (a) In what cases can a seller of goods transfer a better title to them than he himself possesses?

(b) What conditions are implied in a contract for the sale of goods?—(S.COM., L.M.C.)

68. When goods are bought from a person who has (a) stolen them or (b) obtained them by false pretence does the purchaser get a good title to the goods?—(L.C.C.)



69. Is a contract for the sale of goods assignable so as to enable the assignee of the purchaser to enforce it against the Vendor?—(L.C.C.)

70. A timber merchant instructs a warehouse company to accept delivery orders from his clerk who has authority to sell to certain customers only. His clerk fraudulently sells timber to B, who is not on the list; and upon production of the order the warehouse company delivers the timber to B. Can A recover the timber or its value from B?

71. (a) S agreed to sell to B 1,000 tins of canned fruit. He delivered 500 tins but was unable to deliver more. Was B bound to accept the 500 tins?

(b) S agreed to sell to B 1,000 shares in a company. The sale and purchase were effected through members of the London Stock Exchange. S tendered a transfer of 500 shares but was unable to transfer more. Was B bound to accept the 500 shares?—(L.C.C.)

72. (a) What documents are included in the statutory definition of a Bill of Sale?

(b) L lent money to B on the security of furniture which was placed in a locked room in B's house, and the key of the room was given to L. Subsequently a letter was given by B authorizing L to enter and remove the furniture on default of payment. Was the transaction void under the Bills of Sale Acts?—(L.C.C.)

## CHAPTER VII

### AGENCY

1. Define "Agent" and "Principal"; "Express Authority" and "Implied Authority." Is consideration necessary to create an agency?—(S.COM.)

\* 2. How may an agent be appointed? Can a minor be appointed as an agent and can he be sued for entering into a contract on behalf of the principal without instructions from his principal?

3. Define an auctioneer. On a sale of goods by auction, how far is the auctioneer agent for both vendor and purchaser?—(S.COM.)

4. How does the legal position of a factor differ from that of a broker?—(L.C.C.)

5. A directs his solicitor to sell his estate by auction. The solicitor employs an auctioneer for the purpose. Is the auctioneer the sub-agent of A?

6. In what cases has an agent power to appoint a sub-agent? What is the position of (a) an auctioneer, (b) a broker in this respect? If a sub-agent is appointed, to whom is he under liability to account?

7. A was given a power-of-attorney by B to manage B's shop. A who had to go out of town one day, authorized his son C to look after the business. C held a power from his father A. He entered into a contract in the name of B and signed same. What is the position of the parties?—(S.COM.)

8. A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less

than a certain price, and not to give credit to D. B sells the goods to D for less than that price and gives D three months' credit. Advise A.—(L.L.B., BOMBAY.)

9. What is the effect of Agency on contracts with third parties? When is a principal bound by the unauthorized act of his agent?—(S.COM., BOMBAY)

10. Mr. X and Mrs. X live together, and she keeps house for him. He has told her not to run up any bills in his name, but, nevertheless, she orders at P & Co.'s certain household goods (which are not necessities). He is sued thereon by P. & Co. Has he any defence if,

(1) he had previously paid similar bills of hers at P. & Co.'s ;

(2) he has previously paid similar bills of hers at Q. & Co.'s but not at P. & Co.'s ;

(3) he has previously paid similar bills of hers at P. & Co.'s, but his marriage was bigamous?

11. When is an agent personally liable for contracts entered into by him on behalf of his principal?—(S.COM., BOMBAY.)

12. Discuss the position of an undisclosed principal in a contract.—(M.COM., CALCUTTA.)

13. If an agent contracts for an existing but undisclosed principal, state concisely the respective rights of the agent, the principal and other contracting party

14. What is the effect on a contract on the death of one of the parties to it?

Can an undisclosed principal ever sue on a contract made by his agent? If so, under what conditions can he sue?—(C.C.S. INT.)

15. When is an agent personally bound by contracts entered into by him on behalf of his principal?—(S.COM., BOMBAY)

16. In what circumstances is a principal liable for his Agent's fraud? Does it make any difference that the Agent was acting with a view to his own advantage?

17. What are the chief duties of an agent? What degree of diligence must an agent show in discharge of his duties?

18. Explain what you understand by Ratification of an Agency. State the conditions which should be fulfilled before the Principal can ratify an Agent's acts. Refer to leading cases—(S.A. FINAL.)

19. P instructed his agent A, to sell a picture at a named price. P died. Afterwards, before the fact of his death became known to A, A sold and delivered the picture. Was this binding on P's executors? What rights had they against the buyer?—(L.C.C.)

20. A, who owes B Rs. 500, appoints B as his agent to sell his landed property at Bassein and after paying himself (B) what is due to him, to hand over the balance to A. B is inviting offers. Can A revoke this authority delegated to B? Give your reasons. Is B's authority terminated if A dies or becomes insane?

21. The principal revokes the authority of an agent, who, after such revocation, enters into a contract on behalf of the principal; is the contract binding on the principal?

22. Your firm has assigned goods for sale to factors Charles and Davies respectively in the following circumstances:—

- (a) The goods have been assigned to Charles with the intimation that he may sell them for £25. Three days later he sends a cheques for £25 (less agreed commission) with the comment: "You may as well have the money now, as I hold the goods."
- (b) Your sales manager being in need of cash in connection with your firm's business, and being in Davies' office at the time. Davies hands him £25 (less agreed commission) saying: "Let me have the goods: I'll sell them for £25 and get my money back that way." The goods have been delivered to him on those terms.

The goods being in both cases still unsold, your firm wishes to revoke the authority to sell of both factors, and asks you whether it may do so. What would you advise?—(A.I.S.M.A. INT.)

23. Are there any cases in which an agent can personally enforce contracts entered into by him?

24. An agent, A, makes a secret profit out of his agency, a fact that is discovered by his principal B. Advise B—(A.A.L.A. INT.)

25. Discuss the nature and extent of the remedies available to a principal where his agent contracting on his behalf, has been bribed by the other party to the contract?—(INC. ACCTT.)

26. A, an agent of your firm, places an order with B for 60 electric motors of 'Y' type and 40 motors of 'Z' type. A intends to re-sell the motors on his own account, and your firm is ignorant of the transaction; but knowing that B would not grant him credit, A says he is buying the motors on behalf of your firm.

When your firm hears of the transaction, it proposes to adopt the contract so far as the 'Z' type motors are concerned; but it has no use for the 'Y' type motors.

Can your firm, relying upon A's purported agency, take over the 'Z' type motors? Would your advice be different (i) if your firm took over the 100 motors, (ii) if A, instead of naming your firm, had said, "on behalf of my principal in Halifax?"—(A.I.S.M.A. INT.)

27. D, who is an agent for E, makes a contract for E with F. He does so because F has promised him half his profits on the transaction. What are the rights of E, against D and F if he hears of the bribe (1) before the contract is carried out, (2) after the contract is carried out?—(INC. ACCTT.)

28. C, a broker, was employed by the defendant to buy cotton for him with instructions not to disclose his name. C's credit was not good enough to get cotton on his own responsibility, and at the plaintiff's request, he gave him the name of the principal. In the notes, C was named as the buyer, C was called on to pay but he was unable; the plaintiff sued the defendant. How will you decide the suit?—(L.L.B.)

29. The principal directs his agent to do a wrongful act; is the agent bound to do it? Is the principal or the agent liable for the wrong done?

30. What are the chief duties of the principal as regards the agent?

31. What are the general rights of an agent against his principal?

32. Is A entitled to repudiate the following contracts, and if so, what additional facts, if any, must A prove in order to enable him to repudiate the same?—

- (i) A employs B as a broker to sell A's coal. B buys the coal himself in the name of C.
  - (ii) A enters into a contract for the sale of coal with D, ostensibly acting as the broker of E and Co. A subsequently discovers that D is the sole proprietor of E. & Co.
  - (iii) F in London enters into a contract of charter-party with A. In the charter-party F describes himself and signs as "agent for the owners of a ship to be named later." F was in fact not acting as the agent for any owner, but subsequently made a contract for the charter of a particular ship as "agent for the charterer." at a lower rate of freight
  - (iv) A borrows money from G, a money-lender, who advertises and lends money in the assumed name of H.-- (LL.B, BOMBAY.)
33. A owes £20 to B and C jointly. Does he get a good discharge for the debt if he pays the money to B and takes the receipt from him?
34. When may payment be made to the creditor's agent? Can the creditor insist on payment being made in all cases to himself and not to the agent?
35. (a) State the different ways in which an agency may be terminated.
- (b) A consigns 1,000 bales of cotton to B who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. Before B sells the bales, A revokes B's authority to do so. Advise B.  
—(D.COM. I.M.C.)
36. A employs B to make a contract for him. B makes the contract in his own name with C, who afterwards discovers that B in making the contract was really the agent of A. What are C's rights?—(LL.B.)
37. Distinguish between a contract which is void for illegality and one which is mere void. In what respects is the distinction of importance? Where X has an alternative right in a contract to sue either as Principal or his agent, in what way can his freedom of choice in sue the one or the other be determined?—(C.C.S. FINAL.)
38. Write short notes on any two of the following:—
- (a) Secret profits of an agent.
  - (b) Breach of warranty of authority.
  - (c) Del Credere agent.
  - (d) Agency by estoppel.
  - (e) Market overt.
39. What do you understand by—
- (i) Agency by necessity.
  - (ii) Del credere agent.
  - (iii) A Factor.
  - (iv) A Broker?—(I.S.M.A. FINAL.)
40. A sues B upon a contract by which B is personally bound, and obtains a decree against B. Thereafter A comes to learn that B was C's agent in the contract, and institutes a suit against C. The decree obtained by A against B had remained unsatisfied at the date of A's suit. Is A entitled to a decree against C, regard being had to the fact that A had already obtained a decree against B?
41. Your firm has sold goods to Brown; you know that he is only acting as an agent, but not knowing the name of his principal in the

transaction, you debit Brown's account. Difficulties arise over payment, in the course of which you discover that Brown's principal was Smith: you then take action against Smith, who pleads in his defence that since you knew that Brown was only an agent but nevertheless debited him, you cannot now look to Smith. State your reasons for considering this a good or a bad defence.—(A.I.S.M.A. INT.)

42. If an agent in making a contract exceed his authority, is the principal bound by such contract?—(LL.B.)

43. What is the extent of a master's liability for the servant's (i) fraud, (ii) want of care in carrying on the business in which he is employed?—(LL.B.)

44. What is "Holding out" as an agent on behalf of a pretended principal? Who is liable on contracts made by such an agent? Can the pretended principal ratify those contracts?

45. *Delegatus non potest delegare*—a delegate cannot further delegate. How far does this maxim apply to a Contract of Agency? Distinguish in this connection between a Sub-Agent and a Substituted Agent.—(R.A. FINAL)

46. What do you understand by (a) Bailment, (b) Pledge, (c) Pakka Adatia, (d) Contract of Indemnity, (e) Mercantile Agent, (f) Good Faith, and (g) Seller's right of resale?

47. What is a mercantile agent? Can a mercantile agent who has obtained goods by false pretences give a good title to a person who honestly buys the goods from him?—(C.C.S. FINAL.)

48. Distinguish between (a) Pakka Adatia, (b) Kachha Adatia and (c) *Del credere* Agent.—(B.COM., BOMBAY.)

49. How does a "Del Credere" agent differ from other agents?

X acting for Y as a "Del Credere" agent sold a cargo of timber to Z. When the timber was delivered Z rejected it as not being up to sample. Y at once called upon X to pay the price. What are X's legal rights (if any)?—(C.C.S. FINAL.)

50. What are the duties of a *Del Credere* Agent, and a sub-agent, and the liabilities of a person who holds himself out as an Agent?

51. What is the difference in the legal position, (a) of a general agent and a special agent and (b) of a factor and a broker?

## CHAPTER VIII

### PARTNERSHIP

1. Define a partnership. What are the essential elements of a partnership and what circumstances make an association illegal as a partnership?—(INC. ACCTT.)

2. A and twelve others desire to enter into partnership for the purpose of carrying on the business of Banking and seek your advice. What will you advise them?

Would it make any difference:—

(a) if these 13 persons desire to carry on any business other than that of Banking;

(b) if twenty persons desire to form a partnership that has for its object acquisition of gain by carrying on any business other than that of Banking;

(c) if 22 persons form an association for the purpose mentioned in (b) above;

(d) if 22 persons obtain the Royal Charter and desire to carry on any business for gain?

Give reasons.—(B.COM., BOMBAY.)

3. What is meant by "Partnership property," and how far is it liable for a partner's separate judgment debt?—(INC. ACCT.)

✓4. How far, if at all, is an agreement in writing necessary for the formation of a partnership? What is a partnership at will, and when does it arise?—(A.A.I.A. INT.)

5. A and B agree to divide the profits of a business in equal shares, but the loss, if any, is to be borne by A alone. Is it a case of partnership?

6. Is sharing of profits conclusive evidence of partnership? A, a country gentleman, lent £5,000 to the firm of B & Co. on the terms that he should receive a share of profits but not be liable for any losses incurred by the firm in their business. These terms were set out in a written statement. The firm is now in financial difficulties. What facts would you take into consideration in advising the creditors of B. & Co., whether A was liable for the debts of the firm?—(INC. ACCT.)

7. How does the legal position of a limited partner differ from that of a general partner?—(A.A.I.A. FINAL.)

✓8. What is the test of determining whether the relation of partnership between A and B does or does not exist?—(LL.B., BOMBAY.)

✓9. Set out the liability of a retired partner, a minor partner and one permitting himself to be represented as a partner.

✓10 Distinguish partnership from co-ownership

A is a partner in a firm for a short time. Discuss his liability in respect of the firm's debts incurred (i) before he became a partner, (ii) while he was a partner, and (iii) after he ceased to be a partner. —(B.COM., BOMBAY.)

✓11. What are the rules determining partners' mutual relations in the absence of a contract to the contrary?—(B.COM., BOMBAY.)

✓12. Can a minor be a partner in a firm? State his liability on attaining majority.

13. Can a minor be admitted as a partner in a firm and can he sue and be sued in the name of the firm? Is there any protection afforded by law to a minor partner with regard to the benefits and liabilities arising to him out of business transactions?

14. What was the effect of the declaration of war by Great Britain against Germany upon partnership between British India subjects on the one hand and German subjects on the other in India?

15. A, a British subject, entered into a partnership with B an Austrian, by an agreement dated 1st January 1912. The firm has a place of business in London, and another in Vienna. Discuss the questions that arose in relation to the said partnership upon the declaration of war.—(INC. ACCT.)

✓16. Distinguish between a Joint Hindu Family firm and a Partnership. Is the former governed by the Indian Partnership Act?

17. X retired from a firm as at 31st December 1938. The continuing partners have carried on the business since that, but have not yet settled the partnership accounts as between themselves and X, nor paid out his share of the capital. What rights has X in regard to profits made by the firm since his retirement?—(L.C.C.)

18. A and B, who are partners, borrowed money from C. Eventually C sued them on the loan, and obtained a decree which was not satisfied. Subsequently, C discovered that D was a partner with A and B at the date of the loan. Discuss the rights of the parties.

Would it make any difference if D was dead and his estate being administered at the time?—(S.COM., CALCUTTA.)

19. What are the liabilities of a person who holds himself out as a partner, as to the public and as to the other members of the partnership?

✓20. State the rules regulating the mode of settlement of accounts of a firm after dissolution.

✓21. Explain the position of a partner in regard to liabilities existing (a) prior to the time of his joining the firm, and (b) at the time of his retirement, and (c) as to liabilities incurred by the firm after his retirement. In what way may the liability of an incoming, or a retiring partner be modified or extinguished?—(INC. ACCTT.)

22. A partnership consisting of A, B and C enters into a continuing contract with E which is to run over a period of five years. After two years A retires from the firm and D becomes a partner, A taking a covenant from B, C and D to indemnify him against all liabilities under the contract. E knows of A's retirement and of D's entering the firm. What subsequently are E's rights against A and D, respectively?—(INC. ACCTT.)

✓23. What is the position of the executors of a deceased partner in an ordinary partnership as regards—

(a) the creditors of the firm, and

∴ (b) a legatee of the deceased partner's share in the partnership business?—(INC. ACCTT.)

24. What is the nature and extent of the authority of a partner to bind the firm?

What are the provisions of the Partnership Act with regard to the admission of a minor as a partner in a firm?—(S.COM., BOMBAY.)

25. When are partners bound by a contract made by one of them? What is the nature of the liability?—(A.A.L.A. FINAL.)

26. A is a partner in a firm of solicitors. A draws a bill of exchange in the name of the firm without authority. Are the other partners of the firm liable on this bill?—(S.COM.)

27. One partner retires from a firm and the other partners continue the business. Nine months afterwards the firm becomes bankrupt. Discuss the liability of the retired partner to the creditors of the firm.—(INC. ACCTT.)

28. State briefly the statutory rules regulating the mutual relations of partners, in the absence of any express contract between the parties. A, B and C enter into a partnership. The partnership agreement provides that the nett profits should be divided equally. The business

is carried on for many years, A getting half of the nett profits, B and C between themselves half. All parties know of and acquiesce in this agreement. The profits are now Rs. 300. What are the shares of A, B and C? Give reasons.—(S.COM.)

29. Explain: "A partner is the agent of the firm for the purposes of the business of the firm." Discuss the law regarding a partner's implied authority to bind the firm by his acts.

A partner opens a banking account on behalf of the firm in his own name. Is this action authorized by law?—(S.A. FIRST.)

30. B and C jointly promise, for a valuable consideration, to pay A Rs. 10,000. A files a suit against B and obtains a decree for the amount. Before the decree is drawn up, B turns an insolvent and A is unable to recover the amount of the decree or any part thereof. He files a suit against C. Will he succeed? Give reasons.—(LLA.)

31. The firm of X Y Z was indebted to C. X, a partner, gave his own cheque in payment. It was dishonoured on presentation. C obtained judgment against X, but was unable to obtain anything under the judgment. Could C afterwards sue the firm?—(L.C.C.)

32. Is a partner liable in any case for the frauds of his co-partners? A and B are partners. Z carries on a competing business. A bribes a clerk of Z's to disclose confidential particulars of Z's business in breach of his (clerk's) contract with Z. Is B liable to Z?

33. To secure a debt due from A's firm to their bankers, A, whose firm had, in the ordinary course of business, possession of some delivery warrants belonging to B, wrongfully pledged them with the Bank without B's knowledge and one of A's partners, who knew nothing of the fraud, also gave to the Bank another security for the same debt. The firm having become bankrupt, the Bank paid themselves by selling B's property. What remedy, if any, has B? State the principles involved.—(INC. ACCTT.)

34. What are the liabilities for debts and obligations of a firm:

- (a) of an incoming partner,
- (b) of an outgoing partner,
- (c) of a deceased partner's estate?—(A.A.I.A. INT.)

35. What is meant by *estoppel*? Point out in what manner the doctrine applies to partnership transactions.—(INC. ACCTT.)

36. It is often said that the Law of Partnership is a branch of the law of principal and agent. Examine and justify this statement in relation to the liability of the firm for the acts of the several partners, both in the matter of contract and in matters of tort.—(INC. ACCTT.)

37. A and B, together with C, are carrying on business as agents for the sale of motor cars and accessories, have discovered that C made a secret profit when selling a car in the name of the firm. Advise A and B as to their rights.—(INC. ACCTT.)

38. State the general rules for determining the interests of partners and their rights and duties in the partnership, in particular as to (a) the capital and profits of the business; (b) the management; (c) indemnity of partners; (d) the partnership books.—(INC. ACCTT.)

39. Point out what is meant in an ordinary partnership by joint property of the firm as distinguished from separate property of the partners in it. What, if any, right have the separate creditors of the partners against the joint property of the firm?—(INC. ACCTT.)



40. In the absence of any provision on the subject in the partnership articles, what right of inspection of the partnership books (if any) has one member of the firm? Would it make any differences to your answer if such member—

- (a) were a dormant partner;
- (b) desired an incorporated accountant to inspect for him;
- (c) were a retiring partner, who has sold the goodwill to the continuing partners?—(INC. ACCTT.)

41. How is a firm affected, as regards third parties, by an individual partner (a) using the credit of the firm for his private purposes, (b) assigning his share, (c) refusing, without reasonable cause, to continue in the partnership? What course would the other partners, or partner, take in these several circumstances?—(INC. ACCTT.)

42. In what ways may a partnership be terminated? Where there are separate creditors of each partner, and joint creditors of the firm, discuss the question of the distribution of assets.—(C.C.S. FINAL.)

43. (a) Can a partnership firm be dissolved by public notice? How far does such a dissolution affect customers? Is there any difference between the position of old and new customers in such a case?

(b) X is the sole owner of a firm. He admits Y as a "partner" on the following terms:—(1) Y was not to bring in any capital, (2) Y was not to be responsible for the losses of the firm, (3) Y was to receive a fixed sum of Rs. 500 per month in lieu of profits. Y had all the powers of a partner and was known in the trade as such for many years.

Discuss the legal position of Y. Is he partner, agent or servant?—(B.COM., BOMBAY.)

44. (a) Describe the cases in which a partnership firm is compulsorily dissolved.

(b) In what different ways is it open to a partner to retire from the partnership firm, and how far would his retirement affect the rights of third parties?—(B.COM. L.M.C.)

45. How can a partnership be dissolved apart from express agreement? What is the effect of (a) the death, (b) the insolvency, of one of the partners upon the existence of the firm?

46. In what cases may the Court dissolve a partnership at the suit of a partner?—(B.COM., BOMBAY.)

47. After the dissolution of partnership, what authority has each partner (if any) to bind the firm?—(INC. ACCTT.)

48. Within what time, after dissolution, should one partner sue his co-partner for account and share of the profits of the partnership?—(B.COM., BOMBAY.)

49. What do you understand by the term "goodwill"? What becomes of the "goodwill" of a partnership on dissolution?—(B.COM.)

50. A firm of grocers dissolved partnership and sold the goodwill of their business to X, Y and Z, who are now carrying on the same business at the same address. Subsequently the old partners A, B and C again entered into partnership as grocers, set up a competing business next door to X, Y and Z, have solicited customers of their old firm. Advise X, Y and Z.—(INC. ACCTT.)

51. A, B and C enter into partnership for a period of two years. Can B and C expel A from the partnership for A's misconduct in the affairs of the partnership business?—(LL.B., BOMBAY.)

52. State the circumstances leading to the dissolution of a partnership (i) by operation of law, and (ii) by the act of the parties.—(B.COM., I.M.C.)

53. How far is the expulsion of a partner valid? What are the rights of the expelled partner?—(A.A.I.A. FINAL.)

54. Where a partner has paid a premium to the other partners on entering into partnership for a fixed term, and the partnership is dissolved before the expiration of the term, has the partner who paid any right to a return of the premium?—(L.C.C.)

55. In the relation of partners to one another what is their duty as to (a) rendering accounts, (b) accounting for private profits, and (c) competing with their own firms?—(C.A.)

✓56. What is meant by registration of a partnership firm under the Indian Partnership Act, 1932? Is such registration compulsory in respect of every firm?

57. Explain the procedure for registration of a firm under the Indian Partnership Act, 1932.

✓58. What is the effect of non-registration of a partnership firm as regards enforcement of rights of (a) partners *inter se*, (b) a partner against the firm, (c) firm against a partner, (d) firm against third parties, (e) third parties against the firm? Will it make any difference in your answer in case of a suit or claim of set off of a sum not exceeding Rs. 100 in value?

## CHAPTER IX

### CONTRACTS OF INDEMNITY AND GUARANTEE

✓1. Distinguish between a contract of indemnity and a contract of guarantee.

A owes B a debt guaranteed by X. The debt becomes payable and B demands payment, threatening action in default. Y intercedes on behalf of A and requests B to give time to A for payment which B agrees to do. Is X discharged from his liability?—(B.COM., BOMBAY.)

✓2. What is meant by a contract of continuing guarantee? Is such contract revocable and if so to what extent and in what manner?—(B.COM., BOMBAY.)

✓3. P guarantees payment to Q of the price of 100 tons of coal to be delivered by Q to R and to be paid for in a month. Q delivers 100 tons to R and R pays for them. Afterwards Q delivers 50 tons to R which R does not pay for. Is P liable for the 50 tons?—(B.COM.)

✓4. What are the limits of the right of indemnity of an agent against his principal?—(LL.B.)

5. B owes to C a debt guaranteed by A. The debt becomes payable C does not sue B for a year after the debt has become payable. Can C recover the debt from A?—(LL.B.)

6. B owes C a debt guaranteed by A. The debt becomes payable C does not sue B and allows his remedy against B to become barred by limitation. Does this operate as a discharge of A?

✓7. Is surety liable where the original contract between the principal debtor and creditor is void or voidable?—(LL.B., BOMBAY.)

✓8. Enumerate the rights of a Surety as against (1) the Debtor, (2) the Creditor, and (3) the Co-Sureties.

A is an infant. He borrows money from X. B stands surety for A. A refuses to pay on the ground of infancy. Is B liable to pay?

—(B.A. FINAL.)

✓9. Under what circumstances is a surety discharged from liability under a contract of guarantee?—(B.COM., BOMBAY.)

10. When can a surety be discharged and what are the rights of the Surety against (i) the principal debtor, and (ii) the creditor?

State, if you can, the difference, if there be any, between the Indian law, and English law on any of those subjects—(B.COM., BOMBAY.)

11. How may a person who has guaranteed the payment of money by another be discharged from liability, the money being still unpaid?—(LL.B.)

12. P, a commission agent, was employed by the plaintiffs, and often had money of theirs in his hands. Plaintiffs required him to find a surety and defendant became surety for him. A claim was made against defendant, which he resisted on the ground that he had not been told, when he gave the guarantee, that P's accounts were at that time much in arrear. Was this a good defence?

How far has a surety a right to full disclosure of the facts?—(L.C.C.)

13. State what acts of a creditor operate as a discharge of the surety. B owes to C, a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. B then becomes insolvent. Thereafter C sues A for the debt. A pleads C's forbearance to sue B for a year as a defence. Is this a good defence?

✓14. (a) Can a continuing guarantee be revoked by the surety?

(b) A, B and C were joint and several guarantors for advances to be made to D by his bank. The bank made advances from time to time and a considerable sum was due when A died. Further advances were made afterwards. The sums paid in to the bank by D, after A's death had become known to the bank, were sufficient to discharge the balance due at A's death. Was A's estate liable for the balance?—(L.C.C.)

15. In what cases is a surety discharged from his liability to the creditor?—(B.A. FIRST.)

16. Brown & Co. agreed to supply certain goods to Ram Baksh if Ram Baksh's wife would guarantee payment to them, and sent a form of guarantee to Ram Baksh to enable him to get his wife's signature thereon. Can Brown & Co. sue Ram Baksh's wife for the price of the goods if she signed the guarantee under pressure of her husband or if she did not know the nature of the document owing to the fact that her husband had never explained the document to her?—(B.COM., LUCKNOW.)

17. A merchant gave credit to D in reliance on references given by R and the X Y Z Co., Ltd., as to D's means and character. D did not pay and the debt was irrecoverable. Had the merchant any remedy against R and the X Y Z Co., Ltd., when the references proved to be untrue?

# CHAPTER X

## NEGOTIABLE INSTRUMENTS

1. Define a promissory note, and distinguish it from a bill of exchange. Are the following promissory notes good:—

(a) I promise to pay B Rs. 100, first deducting thereout any money which he may owe me.

(b) I promise to pay B Rs. 100 for medical attendance and all other charges for the supply of medicine as may be found due?—(D.COM., I.M.C., BOMBAY.)

2. (a) A and C are London businessmen. C has agreed to give A a bill of exchange for £500 payable in three months' time. Draft a bill and show how C usually accepts.

(b) Will a bill of exchange be good (i) payable "six weeks after the death of X"; (ii) payable "six weeks after the marriage of Y"?—(L.C.C.)

3. Define: (i) Bill of exchange; (ii) Drawee in case of need; (iii) Acceptor for honour; and (iv) Payment in due course.—(D.COM. I.M.C.)

4. Distinguish (i) 'Holder' from 'Holder in due course' and (ii) 'bill of exchange' from 'promissory note'. Explain 'Demand Draft'.—(D.COM., I.M.C.)

5. A desires to order a suit of clothes from B, a tailor, and is without the means to pay for it; C is approached to help A and writes and gives the following note to B:—

"To B,

I understand that A desires to order a suit of the value of £5 from you. If you will supply the said suit to A, and he does not pay you the same on delivery, I will pay for it upon demand being made to me."

The suit is made and delivered but A makes default. What is the legal position with full reasons between—

(1) A and B. (2) B and C. (3) C and A?

(A.A.J.A. INT.)

6. Which (if any) of the following can be held to be Promissory Notes:—

(a) "I.O.U. Rs. 100 to be paid on 1st prox."

(b) "Received Rs. 750 for which I promise to pay 8 per cent. from date."

(c) "I promise to pay B Rs. 10,000 on the birth of my first son."

(d) "Received from A Rs. 75 which I promise to pay on demand with interest."

(e) "I promise to pay C Rs. 1,000 on the death of my uncle D if he leaves me more than this amount?"

7. (a) State the essential features of a Negotiable Instrument.

(b) Distinguish between (1) a "Bill of exchange" and a "simple contract," (2) a "Shah Jog Hundi" and an ordinary "bill of exchange,"

(3) a "bill of exchange" and "cheque."—(S.COM.)

✓ 8. Distinguish bills of exchange from (i) Promissory notes, and (ii) Cheques.

Distinguish ordinary cheques from (i) "open cheques" and (ii) "crossed cheques."—(S.COM., BOMBAY.)

9. What is meant by a set of bills? If B, the payee of a bill of exchange drawn by A, lose it before maturity, can he compel A to give him a duplicate and if so, upon what conditions?

10. A passes a promissory note to B for a certain sum. The note makes no mention of interest; but it is agreed between the parties that interest should be paid at the rate of 15% per annum. In a suit by B for the principal and interest due, A contends that he is not bound to pay interest. Will his contention prevail?—(I.L.S.)

11. What is the legal relation between Banker and Customer, and what special incidents attach thereto? To what extent and in what respects may a drawee of a bill of exchange qualify his acceptance?

—(C.C.S. INT.)

12. P draws a cheque on his banker. The amount of cheque is increased by Q without P's authority, and the banker paid in good faith, the increased amount to Q. When is the banker entitled to charge the increased amount and when the original amount?—(S.COM.)

13. A in the course of business signs a cheque for Rs. 500. The amount is inserted in figures only and not in words and the name of the payee is not mentioned. A then hands over the cheque to his cashier C who fraudulently alters the figures 500 into 1,500; inserts the amount of rupees fifteen hundred in words and puts down the name of B as payee. C then forges B's signature on the back of the cheque and gets it cashed from the bank. The alterations are not apparent on the face of the cheque.

State giving reasons whether the bank is entitled to debit A's account with the amount of Rs. 1,500.—(S.COM., BOMBAY.)

14. A gets hold of B's cheque-book and forges B's name on a cheque. He obtains money from B's bankers by presenting the forged cheque and disappears. Does the loss fall upon the bankers or their customer B?—(S.COM.)

✓ 15. What is meant by negotiation?

What is the legal effect of forgery of an indorser's signature?

What is the effect of delivery of a negotiable instrument through post?—(S.COM., BOMBAY.)

16. What is meant by open cheques and crossed cheques?—(S.COM., BOMBAY.)

17. How far does the alteration of a bill of exchange affect the rights of (a) existing parties to the bill, (b) subsequent endorsers?

Would your answer be the same if the alteration was not apparent on an ordinary inspection?

State whether it is material to the validity of the bill if there is an alteration in (1) the date, (2) the place of payment, and (3) the figures in the margin.

18. (a) A passes a demand promissory note for Rs. 5,000 to B on the 1st of January 1927. On the 1st of July, B demands payment verbally. On the 15th of August B sends a solicitor's notice demanding

payment. On the 1st of December 1927 he files a suit to recover Rs. 5,000 with interest. From what date will interest be allowed?

(b) Where no interest is mentioned on the face of the promissory note what interest is awarded?

(c) Within what time must a suit on a promissory note be filed?

What stamp is necessary for a valid promissory note?—(B.COM., BOMBAY.)

19. "A holder in due course has a title free from equities." Explain, with illustrations, this statement.—(A.A.I.A. INT.)

20. (a) Compare 'Negotiability' with 'assignability' of a negotiable instrument.

(b) What happens in the case of a 'Hundi'

(i) when therein 'material alterations' are made,

(ii) when they are accepted without protest, and

(iii) when therein no mention of interest is made?

(B.COM., L.M.C.)

21. Explain fully the characteristics of a Negotiable Instrument. Can Bill of Lading be regarded as a Negotiable Instrument? If so, in what circumstances?—(R.A. FINAL.)

22. What is a negotiable instrument? Do any and which of the following instruments come within that description:—(a) a crossed cheque payable to Bearer, (b) a cheque crossed "Not Negotiable" payable to Bearer, (c) an uncrossed cheque payable to order, (d) a Postal Order?—(C.C.S. INT.)

23. State the conditions of a valid acceptance for honour and mention the rights and liabilities of an acceptor for honour.—(B.COM.)

24. What is meant in relation to bills of exchange by:—(a) a transfer by delivery, (b) an acceptor for honour, and what liabilities are incurred in connection with the bill in each case?

Explain and distinguish the meaning of the following terms in reference to bills of exchange:—(a) a holder, (b) a holder for value, (c) a holder in due course.—(C.C.S. FINAL.)

25. A is the acceptor of a Bill of Exchange of which B is the payee. C, a holder in due course, sues A who pleads that B had no authority to endorse the bill. How will you decide the suit?—(L.L.B.)

26. "A negotiable instrument is one the property in which passes by delivery from hand to hand." Comment.—(M.COM., CALCUTTA.)

27. A puts a blank acceptance in his desk. His clerk steals and fills it up as a complete bill for Rs. 200 and gets it discounted. The bill is dishonoured and a holder in due course sues A, as acceptor. Will he succeed?—(L.L.B.)

28. A draws a bill on B, payable to C or order, which is accepted. D gets possession of the bill and without authority from C endorses it in C's name to his own order. D then endorses the bill to E, who takes it bona fide, for value and without notice. What are the rights of the parties to the bill?—(L.L.B.)

29. In what ways (other than by payment) may a bill of exchange be discharged? Does the loss of a Bill of Exchange discharge it?

—(C.C.S. INT.)

30. What is meant in the Bills of Exchange Act by a bill "payable at a determinable future date"? When a bill, payable at a fixed

period after date, is issued undated, what are the rights of the holder?—(L.C.C.)

31. A gave a cheque to B in payment of bets lost in horse races, and a cheque to C in payment of Stock Exchange differences. B and C endorsed the cheques and handed them to D in payment of goods supplied by him to B and C. Can D recover on the cheques? Would it make any difference to your answer—

- (a) if D had received the cheques from B and C as a gift;
- (b) if D knew of the transactions in respect of which A gave the cheques to B and C?—(INC. ACCTT.)

32. (a) When is a thing deemed to be done in good faith within the meaning of the Bills of Exchange Act?

- (b) A acquired a negotiable instrument from Z for value. Z had obtained the instrument by fraud. A had no actual knowledge of this, and though he had some suspicions, he thought it prudent not to make inquiries. Had he a good title to the instrument?—(L.C.C.)

33. What are the characteristics of a Negotiable Instrument and what presumptions arise regarding it?

Give examples of (i) indorsement in blank, (ii) indorsement "without recourse", and (iii) restrictive indorsement.—(N.COM. I.M.C.)

34. John Smith draws a cheque on his Bank in favour of "Household expenses or order." His servant under his instructions takes it to the Bank and the Bank cashes it after the servant had signed his name on the back of it. The servant absconds with the money. Can John Smith recover from the Bank?

35. B forges C's name as endorser of a Bill of Exchange for £100, C being the payee. Can any rights be acquired through this signature to enforce payment? If the Bill is drawn on Bankers, who meet it at maturity, can they debit the drawer's account with the amount of the Bill?

36. A drew a Bill of Exchange on B (a minor) who accepted it whilst still a minor but dishonoured it on maturity. D an endorsee of the Bill from C the payee sues A on the Bill. Can A set up the defence that B being a minor could not accept the Bill?

✓37. What are the respective liabilities of the drawer, acceptor and endorser of a bill of exchange, when the bill is accepted (a) for value, (b) for the accommodation of the drawer?—(INC. ACCTT.)

38. (a) Distinguish between a "bill of exchange" and a "cheque".

- (b) Is a hundi drawn in an oriental language by the drawer on himself, a promissory note or a bill of exchange? Answer this question with reference to the holder's rights giving reasons for your views.

39. What is an "acceptance for honour" and how far is an Acceptor for honour liable on a Bill?

40. Explain and illustrate:

- (a) "A holder of a negotiable instrument who derives his title from a holder in due course has the right thereon of that holder in due course."
- (b) "Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course."—(I.A., SUMMARY.)

41. (a) Give the characteristic features of a negotiable instrument in respect of the debt due under it.  
 (b) Discuss the implications of an endorsement in its different forms.  
 (c) State what you know about the law bearing on Accommodation Bills.—(S.A. FINAL.)
42. Discuss the effect of the following endorsements on a cheque payable to bearer :—  
 (a) Pay X or order.  
 (b) Pay X.  
 (c) Pay contents to X only.  
 (d) Credit within to X.  
 (e) Pay X value in account with the Bank.
43. (a) Define a cheque.  
 (b) Explain the meaning and effect of—  
 (i) A general crossing.  
 (ii) A special crossing.  
 (iii) A crossing with the addition of "not negotiable".  
 (iv) A cross with the addition of "account payee only".  
 —(I.S.M.A.)
44. What is the effect of the following crossings on a cheque ;—  
 (1) \_\_\_\_\_  
 (2) \_\_\_\_\_ & Co.  
 (3) Lloyds Bank, Bombay.  
 (4) Not Negotiable.  
 (5) a/c Payee. \_\_\_\_\_
45. X is given a cheque for £100 by the Directors of a Company over and above his salary for special excellence of his work. Immediately afterwards it is discovered that X has been dishonest and notice is given to the Bank to stop the cheque. X in the meantime has passed the cheque to Y for valuable consideration ; Y presents the cheque at the Bank and is refused payment. What rights, if any, has Y ?  
 —(A.A.L.A. FINAL.)
46. What protection is given to a banker in respect of crossed cheques ? In what circumstances is the protection lost ?—(L.C.C.)
47. (a) Explain : (i) 'at sight,' (ii) 'on presentation,' (iii) 'after sight,' (iv) 'Jokhmi Hundi,' (v) 'Jawabi Hundi' and (vi) 'Penth'.  
 (b) What are the various incidents of a 'negotiable instrument' applicable to 'Hundis'?—(S.COM., L.M.C.)
48. Explain the rule that in the case of Negotiable Instrument forgery conveys no title. Mention the exceptions, if any, to this rule under Indian Law.—(S.A. FINAL.)



Explain Protection given to the Paying and Receiving Banks respectively, by the Bills of Exchange Act of 1882 to 1932.—(C.C.S. INT.)

50. State the different indorsements to a bill of exchange authorised by the Bills of Exchange Act, 1882.—(A.A.I.A. INT.)

51. A passed a promissory note in favour of B describing himself in the note as "A, agent holding a power of attorney from C". A signed the note in his own name. In a suit by B against A, A pleads that he executed the note merely as agent for C, and that, therefore, he is not liable. Will A's contention succeed? Give reasons for your answer.—(L.L.B.)

52. A sells some goods to the X Y & Co., Ltd., for which he is paid by a promissory note as follows:—

"Three months after date, I promise to pay A or order the sum of Rupees Ten Thousand only for value received.

B,  
Managing Director,  
X Y & Co., Ltd."

A endorses the note to C, but before the due date the Company goes into liquidation. Has C any rights as against B?

53. A draws a cheque for Rs. 1,000, and when the cheque ought to be presented has funds at the bank to meet it. The bank fails before the cheque is presented. What are the rights of the holder of the cheque?—(L.L.B.)

54. X accepts a Bill of Exchange for £100 drawn upon him by Y and payable three months after date. When and where should Brown, the holder, present the bill for payment? What is meant by "days of grace" in this connection?

Will presentation for payment be excused (a) if X tells the holder that he will not pay, (b) if X is made bankrupt?

55. X in the course of business gets a bill of exchange with three indorsements, those of A, B and C. What would be the result:

(a) If B's indorsement is forged, but C had taken the instrument for value without notice, or

(b) The signature of the drawer is forged?—(B.COM., BOMBAY.)

56. Briefly state the cases in which no presentation of a bill of exchange for payment is necessary in law.—(B.COM., L.M.C.)

✓ 57. What is notice of dishonour of a bill of exchange? To and by whom is such notice given? What is the consequence of failure to give such notice?—(A.A.I.A. INT.)

✓ 58. What is notice of dishonour of a bill, and under what circumstances may it be dispensed with? When is an acceptor precluded from denying to a holder in due course of a bill?—(INC. ACCTT.)

✓ 59. Give the rules governing the questions of dishonour and liability of maker, acceptor or indorser of foreign instruments.

—(M.COM., CALCUTTA.)

✓ 60. Distinguish between "ambiguous" and "inchoate" instruments.

—(B.COM., BOMBAY.)

✓ 61. What are (1) "Letters of Credit," (2) "Circular Notes"? Are they negotiable instruments?

62. A signed a promissory note in favour of B for Rs. 1,000 advanced to him. B was in fact only "Benamidar" for K who advanced

the money. A repaid the money to K but without getting the note returned. Can B recover on the note from A?

63. A is the payee and holder of a bill of exchange; he indorses it *sans recours* to B; B indorses it to C who indorses it back to A. The bill having been dishonoured can A recover from B or C?

64. State briefly the rules relating to the presentment of a bill of exchange for payment.

65. What are the rights of a holder of a bill of exchange if it is dishonoured by non-payment at maturity?

When can a stranger to the bill intervene and pay it? What rights does he acquire thereby and how does the payment affect the rights of persons previously liable on the bill?

66. Z draws a Bill of Exchange in favour of Y. Before the due date it is burnt in a fire in Y's office. Has Y any remedy against Z?

67. Are the following defences open to a defendant in an action on a bill of exchange:—

(a) No consideration; (b) Loss of the bill; (c) Material alteration of the bill?

If so, under what circumstances?—(INC. ACCT.)

68. Explain any three of the following —

- (a) Holder in due course
- (b) Endorsement "without recourse".
- (c) Drawee in case of need.
- (d) Shahjog hundi.

. What is the effect of a material alteration on a Negotiable Instrument?

70. "A" who owes "B" £2 draws a cheque for such amount and hands it to "B", who indorses it generally and hands it for value to "C", who presents the cheque for payment. On dishonour of the cheque, discuss the legal position with remedies between (1) "B" and "A"; (2) "C" and "B"; (3) "C" and "A".—(A.A.I.A. INT.)

71. A is payee of a bill. He endorses it in blank and delivers it to B. B further endorses it in blank to C. C endorses it in full to D making it payable to D or order. D without endorsement delivers it to E. Is E entitled to receive payment from (1) A, (2) B, (3) C or (4) D?—(R.A. FINAL.)

72. D is a payee and holder of a bill of exchange. He endorses it "without recourse" to E, who endorses it to F, who endorses it to G, who endorses it back to D. Has D any right against F if the bill is not met at maturity?

73. Explain (i) Shahjog Hundi, (ii) Namjog Hundi and (iii) Nishanjog Hundi. Consider whether the incidents relating to (i) consideration, (ii) presentment and (iii) protest, applicable to a Negotiable Instrument, are also applicable to a Hundi.—(S.COM., L.M.C.)

74. Explain four of the following:—

Indorsement *sans recours*.

Indorsement in blank.

Notice of dishonour.

Protest.

**Merger.**

**Foreign bills.**—(A.A.I.A. INT.)

75. (a) Explain: (i) 'Allonge,' (ii) 'Restrictive Endorsement' and (iii) 'Maturity'.

(b) Explain an 'Inchoate Stamped Instrument' and distinguish it from an 'ambiguous instrument'.—(B.COM., L.M.C.)

## CHAPTER XI

### COMPANY LAW

1. In what essentials is a Private Company different from a Public Company?

2. What special provisions are made in the Indian Companies Act, as to (a) Companies limited by guarantee; (b) Association formed not for profit?

3. Are there any rules prescribed by the Indian Companies Act prohibiting partnerships exceeding a certain number? If so, state them.

4. In the case of a company which has not issued a prospectus, give the particulars to be comprised in the statement, prepared in lieu of a prospectus, which shall be filed with the Registrar, before the allotment of shares is made.—(INC. ACTT.)

5. Define and distinguish between (a) a company, (b) a corporation, and (c) a partnership.—(B.COM., CALCUTTA.)

6. What is the minimum number of members required for starting (a) a public company, (b) a private company?

7. Is it obligatory to have directors in (a) a Private Company, (b) a Public Company, under the Companies Act?—(B.COM., BOMBAY.)

8. What is a Private Company? How does it differ from a Public Company? Discuss the special privileges, facilities and immunities enjoyed by private companies under the Law.—(LL.B., BOMBAY.)

9. Define a Private Company.

How many persons are necessary to form (i) a public company, (ii) a private company? What is the effect of a company carrying on business with less than the legal minimum of members?

—(B.COM., BOMBAY.)

10. (1) What is meant by a 'Prospectus'?

(2) Is it necessary to disclose the contents of the Memorandum in a prospectus?

11. A promoted a company. A prospectus was issued. It contained false statements, on the faith of which B applied for one hundred shares. The shares were allotted to B. The falsity of the statements then became apparent. What remedies are available for B?

Would your answer be the same if B were not an original allottee of shares, but had bought them in the open market?

12. (a) What is the Memorandum of Association of a limited liability company? Can it be changed, if so, in what respects and how?

(b) In addition to the necessary provisions the Memorandum of Association of an Industrial Company contains the terms of employment and remuneration of its principal Engineer. The Company feels the necessity of increasing his remuneration. Can this be done and, if so, how?—(LLB, BOMBAY.)

13. What are the restrictions laid down in the Indian Companies Act as to a Company's power to alter the conditions contained in its Memorandum of Association?—(B.A. FIRST.)

14. What are the Memorandum of Association and the Articles of Association of a company? Are they necessary in all cases? On what persons are the Articles binding?

The Articles of Association of a company provided that A should be employed as their broker for five years. A was not a member of the company. He was not employed as broker. Consider the rights and liabilities of A and the company.

15. Describe the object and the nature of the principal contents of the Articles of Association of a limited liability company. Can the Articles of Association be altered? If so, how and for what purpose? Can a limited liability company restrict or deprive itself of its power to alter its Articles of Association?—(B.COM., BOMBAY.)

16. What restrictions are placed on the choice of a name of a limited company? Can a limited company, subject to any, and if so under what, conditions (i) change its name, (ii) dispense with the use of the word "limited" as part of its name?—(INC. ACCTT.)

17. (a) May a company having a place of business in British India but not incorporated under the Indian Companies Act use the word "limited" as the last word of its name?

(b) Can a company be incorporated under the Indian Companies Act with limited liabilities without using the word "limited" as the last word of its name?

18. Enumerate instances in which the Local Government may permit a company registered under the Indian Companies Act, to dispense with the word "limited".—(B.COM., BOMBAY.)

19. The Articles of a company provided that A should be employed as a solicitor for life of the said company. The company employed solicitors other than A. A brings an action against the company relying on this provision in the Articles. Will he succeed? Give reasons for your answer.—(B.COM.)

20. Define a Private Company and show how it differs from a Public Company. Can you adopt "Table A" as the Articles of Association of a Private Company? Give reasons for your answer.

—(B.COM.)

21. A and B are Directors of Tea Mills, Ltd. From their position as Directors they learn that the company has made large profits during the year, and buy a large number of shares in the company which they sell at a profit of rupees three lakhs as soon as the market rises on the publication of the balance-sheet. Have A and B committed any offence or has the Tea Mills, Ltd., any claim against them in respect of the rupees three lakhs?

22. (a) What are the duties of the directors of a joint stock company?

(b) What is the exact position in Law of the directors of a joint stock company? Are they (1) Agents, (2) Trustees or (3) Managing Partners as in a firm?

Give reasons for your answer.

(c) A wishes to sell some of his own property to a company of which he is a Director. Can it be done and, if so, how? Can he vote (1) as a Director, (2) as a shareholder, in respect of this sale?

22. Has the Court jurisdiction to interfere with the internal management of a joint stock company acting within its own powers?

When can a shareholder bring an action against the company?

—(S.COM., BOMBAY.)

24. Is it necessary for a limited company to have directors under the Indian Companies Act?

How are the first directors appointed?

What are the usual qualifications of a director?—(S.COM., I.M.C.)

25. When can a joint stock company forfeit the shares? And what are the rights and obligations of the parties on such forfeiture?

Under what circumstances shall the office of a director be vacated?

—(S.COM., BOMBAY.)

26. How does forfeiture differ from a surrender of shares?

—(S.COM., I.M.C.)

27. State, as briefly as possible, the various ways in which the capital of a company is most frequently altered, and distinguish between Reduction and Diminution of capital.—(S.COM., CALCUTTA.)

28. When the capital of a joint stock company limited by shares, has been reduced, what is the liability of the past and the present members of the company in respect of the reduced shares?

—(LL.B., BOMBAY.)

29. (a) What are the books which a joint stock company is bound to keep?

(b) What is the "Reserve fund" of a limited company? Distinguish it from the Secret Reserve.—(S.COM., I.M.C.)

30. In what way can a limited company create reserve capital? What is the nature of such capital? Can it be turned into ordinary capital? Has the company any power to deal with such capital?

—(INC. ACCTT.)

31. What is the liability of untrue statements in a prospectus? A prospectus contains statements of facts, which the directors know are false. All the shares are applied for, and the allotment of shares is completed. Thereafter A, who had happened to read the prospectus, buys some of the shares in the market on the faith of the representations contained in the prospectus. After some time, the company is taken into liquidation. Has A any remedy against the directors?

32. A company's prospectus contains untrue statements of (a) facts as well as (b) law. B, relying on these untrue statements, buys shares and pays for them. What right has B, on his discovering these irregularities, in case (1) he was the original shareholder, and (2) where he bought these shares from the market?—(S.COM.)

33. What conditions must be complied with before a valid allotment of the share-capital of a company can be made? What is the

effect of an irregular allotment? What return as to allotment must be made and to whom?—(INC. ACCT.)

34. What restrictions are imposed by the Indian Companies Act on commencement of business by a company?—(B.COM., BOMBAY.)

35. What happens to the contracts by the company prior to its being entitled to commence business, in the event of the company not being able to commence business?—(B.COM., I.M.C.)

36. What is a Call? Under what circumstances, if any, may the directors of a company allow shareholders to pay up the amount due on their shares before any call has been made?

37. What is an Underwriting Agreement, and when is it lawful? How does it differ from an agreement to pay brokerage?

38. A took an allotment of shares in a company at sixteen shillings paid per each twenty shilling share (nominal). The certificate was to the effect the shares were fully paid. The company later went into liquidation. Consider A's liability.

39. X and Y are shareholders in the Blank Co., Ltd., X has transferred his shares to Z. Y's shares have been forfeited by the directors. Discuss the liability of (a) X for future calls, (b) Y for past calls.—(INC. ACCT.)

40. Is it compulsory under the Indian Companies Act to have directors? What are the obligations imposed on these directors as to voting at a Board Meeting in connection with a matter in which they are interested?—(B.COM.)

41. In 1918 the O. K. Company, Limited, increased its capital by the issue of 1,000 shares of Rs 100 each, which were subscribed and paid up at a premium of Rs. 50 per share. The Rs. 50,000 premium was placed in the Reserve Fund. In 1920 the Company did not make such a large profit as usual and the whole of the Reserve Fund except Rs. 10,000 was utilized by the directors in payment of a 50 per cent dividend to the shareholders. Was there anything illegal in this procedure?

42. If one of the directors of a joint-stock company is compelled to pay for misfeasance, can he recover contribution from the other directors? (B.COM.)

43. Can a minor be a shareholder of a company? If so, what is the extent of his liability? G, the guardian of M, a minor, applies for his allotted shares in a company in his own name. G purports to act for and uses M's money to take the shares. Can M repudiate the transaction on attaining majority and claim a refund from the company? Give reasons.—(B.COM.)

44. A is a registered member of a company. How far is A's position affected by the fact that A is (a) an Infant, (b) a Married Woman, (c) another company?

45. What is meant by saying that the register is only *prima facie* evidence of membership?

46. In what manner are shares transferred? Has a shareholder an unrestricted right to transfer his shares? Can the directors of a company refuse to register a transfer of shares with or without specifying any grounds for such refusal?—(INC. ACCT.)

47. In what circumstances and by what authority may a limited company pay interest out of capital? What statutory obligations in

relation to their accounts is imposed on companies who have made such payment of interest?—(C.C.S. FINAL.)

48. Explain the difference between Circulating Capital and Fixed Capital. Out of what fund may dividends be paid?—(M.COM., CALCUTTA.)

49. What is the difference between—

(a) an ordinary, (b) a special, (c) an extraordinary resolution of a company?

50. Can a joint stock company borrow money? If so, under what circumstances and by what means?—(S.COM.)

51. The directors of the company borrow money without authority. What is the position created in case this act is (a) *ultra vires* the directors, or (b) *ultra vires* the company? Discuss fully.—(S.COM.)

52. Explain the effect of a company borrowing beyond its powers. Under what circumstances can the lender recover his money from (1) the company, (2) the directors?—(S.COM.)

53. What particulars must the register of members of a company contain? What are the provisions of the Company Law with regard to (a) inspection, (b) obtaining copies of the register?—(INC. ACCTT.)

54. What are the provisions in the Indian Companies Act for the registration of mortgages or charges created by a company?

In May 1918 X & Co., Ltd., executed a mortgage in favour of M. The mortgage was, through inadvertence, not registered with the Registrar of Companies until April 1919 when by an order of the Court the time for registration was extended to 30th April 1919 without prejudice to the rights of parties acquired prior to registration. In October 1918 the company created a charge in favour of D, a director, which was duly registered. Who is entitled to priority as between M and D?—(S.COM., L.M.C.)

55. (1) Write notes on:—

(a) The Statutory Meeting.

(b) The Annual General Meeting.

(c) The Extraordinary Meeting.

(2) A notice to convene a General Meeting is properly given. The directors want to put off the date for holding the meeting. Can they do so? What is the proper course for them to adopt?

—(L.L.B., BOMBAY.)

56. How often must a company prepare a balance-sheet in order to comply with the Indian Companies Act, 1913?

57. (a) What are the powers and duties of the Auditors of a joint stock company?

(b) To whom should the Auditors make their report? On what must the Auditors base the report and what must they state in it?

—(L.L.B., BOMBAY.)

58. By whom may the first auditors of a company be appointed, and how are subsequent appointments made? What are the powers and duties of auditors and how far are they to be deemed officers of the company? When, how, and by whom may inspectors be appointed to investigate the affairs of a company?—(INC. ACCTT.)

59. In what cases is the office of a Director vacated under the Indian Companies Act?—(N.A. FINST.)

60. (a) A buys shares of a joint stock company on the Stock Exchange. Before purchasing the said shares he read a copy of the prospectus of the company and relied on various statements therein contained, which are subsequently found to be false. Has A any, and if so what, remedy against the company?

(b) A joint-stock company paid dividends on the balance-sheets signed by the auditors. Subsequently it was found that owing to the fraud of the manager of the company the stock-in-trade of the company was grossly overestimated from year to year. Are the auditors liable to make good the amount wrongly paid out by way of dividends?

(c) A Managing Director of a joint stock company draws a Bill on behalf of the Company. In fact the Managing Director had no authority to draw the bill. Is the bill binding upon the company?

(d) The Articles of Association of a joint stock company authorize the payment of dividends out of the paid-up capital of the company. At a General Meeting of the company the payment of a dividend out of the paid-up capital is sanctioned by a majority of the shareholders and the dividend is paid by the directors. What is the liability of the directors, if any, in respect of such payment?—(L.B., BOMBAY.)

61. A limited liability company, having gone into liquidation, owes money to some of the shareholders. Can such shareholders claim a set-off against any unpaid call?—(S.COM., LUCKNOW.)

62. Enumerate the conditions generally endorsed on a debenture. Define a Floating Charge and explain its effects.—(M.COM., CALCUTTA.)

63. Does a floating charge take priority over (1) a subsequent legal mortgage taken (a) with (b) without notice of the Debenture? (2) a subsequent Equitable Mortgage without notice?—(C.S. FINAL.)

64. What are Founders' shares? What is meant by cumulative preference shares with preference as to capital? Can shares be issued at a discount?—(S.COM., I.M.C.)

65. Explain any three of the following:—

(a) A company limited by guarantee.

(b) Floating charges.

(c) Certification of transfer.

(d) Qualification shares.

(e) Private Company.—(R.A. FINAL.)

66. (a) Distinguish between shares, debentures, and debenture stock.

(b) Write a note on the different kinds of Debentures which a company can issue and discuss the peculiarities of each.

67. Define (a) Scrip, (b) Share Certificate. What estoppels arise in connection with the latter? Would these estoppels arise in connection with a share certificate forged and issued by the secretary of a company? In what cases may a company refuse to register a transfer of shares?

68. The X Mills, Limited, a company incorporated in Bombay, has given a floating charge on its property to M. N., its Managing Agent, to secure Rs. 15 lakhs, which charge is duly registered under Section 109 of the Indian Companies Act. A client of yours, to whom the company owes a large sum, wishes to know the full terms of the charge. How would you advise him to obtain these particulars?



## CHAPTER XII

## LIQUIDATION OR WINDING-UP OF JOINT STOCK COMPANIES

1. In what manner can a voluntary winding-up be brought about? When does such winding-up commence?—(INC. ACCTT.)

- ✓ 2. What are the effects (if any) of a voluntary winding-up on—
- (a) the powers of the directors,
  - (b) the transfers of debentures,
  - (c) the transfers of shares,
  - (d) the corporate powers of the company?—(INC. ACCTT.)

✓ 3. What are the powers of a liquidator in a voluntary winding-up? Are these powers more or less wide than in case where the winding-up is by the Court? Give reasons for your answer—(B.COM.)

4. Point out the difference between the mode of appointment of a Liquidator in Voluntary Liquidation and a Liquidator under the order of a Court, and the difference in their rights and duties.—(B.A. FINAL.)

✓ 5. How, and by whom, is the liquidator appointed (a) in a voluntary winding-up, (b) in a winding-up under the supervision of the Court, (c) in a winding-up by the order of the Court?

—(INC. ACCTT.)

6. Define the position of a provisional liquidator. In a voluntary winding-up by whom and when is a liquidator appointed: and how is his remuneration fixed and paid? What notice, and to whom, must he give of his appointment? What statutory consequences ensue on the voluntary winding-up of a company?—(INC. ACCTT.)

7. If by death or resignation any vacancy occurs in the office of liquidator, in what manner may such vacancy be filled up? Can a liquidator be removed from his office, and if so, in what manner?

—(INC. ACCTT.)

8. On what grounds may a creditor present a petition for a winding-up of a company by the Court? Is there any difference where a contributory presents a petition? If so, in what respect?

—(B.COM., I.M.C.)

9. (a) Who is a contributory? What is the extent of the liability of a past member on a winding-up?

(b) Who settles the list of contributories? If a party is dissatisfied with the list, what is his remedy?—(B.COM., I.M.C.)

10. On what grounds can a shareholder present a petition for the winding-up of a company?

A is a shareholder of P and Company. In January 1920, P and Company incur a liability of Rs. 50,000. In March 1920, A sells his shares to B. In August 1920, P and Company incur a further liability of Rs. 2 lakhs. In January 1921, P and Company go into liquidation. The liquidator calls upon A to contribute in respect of (1) the debt of Rs. 50,000, (2) the debt of Rs. 2 lakhs. How far will the liquidator succeed? Will your answer be different if P and Company were being wound up in July 1921 instead of January 1921?—(B.COM.)

11. What is meant by the "List of Contributories"? Of how many parts does such a list consist and by whom is it prepared?

12. In a voluntary winding-up how is a liquidator to ascertain the liabilities of a company and to get the time for making claims limited? When he is not satisfied with the validity of a claim what courses are open to him?—(INC. ACCTT.)

13. Before the commencement of the winding-up A lent a company £1,000 at 5 per cent interest, and B recovered judgment for £500 against the company for goods supplied. Is either A or B entitled to prove in the voluntary winding-up for any, and if so what, interest on the sums owing to him?—(INC. ACCTT.)

14. What are the provisions in the Indian Companies Act which provide for the priority of payments of certain claims to the crown or to a local authority?—(S.COM., BOMBAY.)

15. How and when should the liquidator pay dividends to (a) creditors; (b) contributories?—(INC. ACCTT.)

16. In what order of priority must the liquidator make payments of the costs and expenses of the winding-up? Is he personally liable for such costs or for negligently distributing assets?—(INC. ACCTT.)

17. The liquidator in a voluntary winding-up has paid out of the company's assets the claims of the company's creditors and the costs of the liquidation. How must he distribute any surplus assets that still remain in his hands?—(INC. ACCTT.)

18. Is a liquidator entitled to—

- (a) pay certain claims of creditors in full,
- (b) make compromises?

If so, to what extent and subject to what sanction, if any?

—(INC. ACCTT.)

19. What are the powers of a liquidator and how do they vary in—

- (a) a compulsory liquidation,
- (b) a liquidation under supervision of the Court,
- (c) a voluntary liquidation?—(S.COM.)

20. When and how may a company be wound up voluntarily? Give a brief account of the proceedings in such a voluntary liquidation.

21. A is a member of a company in voluntary liquidation. B and C are creditors of the same company. In what cases and on whose application will the Court make an order for compulsory winding-up?

22. May a petitioner who presents a petition to wind up a company ever be compelled to give security for costs? If so, in what cases?—(INC. ACCTT.)

23. What books have to be kept by the liquidator and what must be entered therein? Who is entitled to inspect such books?

—(INC. ACCTT.)

24. When can you apply for the compulsory liquidation of a company?—(S.COM., CALCUTTA.)

25. When may a company be wound up by the Court?

How may the insolvency of a company be proved?

—(M.COM., CALCUTTA.)

26. (a) In what cases can a company be wound up by the Court?

(b) What are the preferential payments to be made in winding-up of a company?—(S.COM., BOMBAY.)

27. In a winding-up by the Court, when and how and to whom is a liquidator to apply for his release?—(INC. ACCTT.)

28. In a winding-up by the Court what powers has the liquidator—  
(a) to make calls, (b) to enforce payment of calls?—(INC. ACCTT.)

29. What debts are, and what debts are not, provable in the winding-up of an insolvent company?—(INC. ACCTT.)

30. T, the owner of chalk quarries, agreed to supply over a long period, to a company, owners of cement works adjoining the quarries, all the chalk which the company should require, at a fixed price. The company sold its undertaking and went into liquidation. Could the purchasers require T to supply chalk to them in accordance with the contract with the company?—(L.C.C.)

31. What is a "Floating charge"? What is the effect of a floating charge on the assets of the company in winding-up?—(B.COM., BOMBAY.)

32. Whose agents is (a) a receiver appointed by debenture-holders, (b) a receiver appointed by the Court? Is either of them ever personally liable on the contracts he makes?—(B.COM., CALCUTTA.)

33. M, who was then a minor, purchased partly paid-up shares in a Banking Company in May 1925. He attained majority in May 1926 and in November 1927 the bank went into compulsory liquidation. Is M liable to be put on the list of contributories and is he liable for calls?

## CHAPTER XIII

### LIFE AND FIRE INSURANCES

1. Define Life Assurance. Discuss how far the rules as to insurable interest apply to this branch of insurance. Also state if the Life Policies are assignable, and if so, what steps should be taken by the assignee to complete his title thereto.—(B.COM.)

2. What do you understand by "insurable interest" in contracts of Life Assurance? Brown has a wife, a son, a servant, a grandmother, and a friend who owes him £50. Has Brown an insurable interest in the lives of any of these persons? Have any of these persons an insurable interest in the life of Brown? If so, under what circumstances and to what extent?—(INC. ACCTT.)

3. In what cases may a person insure the life of another? In what respects do the rates relating to insurable interest differ in the case of life insurance from those in the case of fire insurance?

—(C.C.S. FINAL.)

4. A insures the life of B who owes money to him. After B's death his executors pay the debt to A. Subsequently A sues the Insurance Company upon the policy. The Company declines payment on the ground that the debt in respect of which the insurance had been effected, has been discharged. Is that defence valid?—(L.L.B.)

5. W insures his life with S & Co. W subsequently becomes a lunatic and whilst of unsound mind commits suicide. What rights have the heirs of W against S & Co.?—(L.L.B.)

6. V agreed to sell to P a policy of assurance on the life of X, whom both parties believed to be living. The purchase-money was paid and the policy assigned to P. It was afterwards ascertained that

X had died before the date of the contract, and P obtained payment of the policy moneys. Had V any claim against P?—(L.C.C.)

7. What are the provisions of the Road Traffic Act, 1934, with respect to the rights of the insurers to avoid or cancel the Policy? In what cases (apart from express contract) is the premium returnable to the insured?—(C.C.S. FINAL.)

8. Explain by what arrangement a Life Policy may be taken out, which shall not be subject to assured's debts. In what way may a life policy be (a) assigned, and (b) utilized as a collateral security?

—(INC. ACCTT.)

9. L made a proposal to an insurance company for an insurance on his life for £5,000. He answered the questions on the proposal form truthfully. A few days later, but before the proposal was definitely accepted, L was taken ill with pneumonia. Subsequently the company accepted the proposal and the first premium was paid. Two days later, L died of pneumonia and the Company learned for the first time of his illness. Is the Company liable to pay the £5,000?—(L.C.C.)

10. The proposer for a Life Assurance makes a statement in the proposal that he did not suffer from any disease tending to shorten his life. He knew that he was suffering from a disease which did in fact shorten life but he did not know it had such a tendency. What is the effect of such a statement on the policy?

11. Explain the terms—

Endowment Policy; Joint Life Policy; Sinking Fund Policy; Surrender Value.

12. What is meant by the "Life Assurance Fund" of a company under the Indian Insurance Act, 1938?

13. What accounts and balance-sheets should a Life Assurance Company prepare under the Indian Insurance Act, 1938?

14. What annual accounts does a Life Assurance Company have to register and with whom must they be registered?

15. A client who is a policy-holder in a Provident Insurance Society expresses doubt as to the solvency of the society. Advise him as to any method of ascertaining the society's true position.

16. A Life Assurance Company incorporated in Scotland wishes to commence life assurance business in British India. What are the necessary formalities before it does so?

17. Discuss the terms "Premiums," "Reinsurance policies," "Surrender value," and state the functions of Provident Funds or Provident Insurance Societies.

## FIRE INSURANCE

18. What is meant by insurable interest in a contract of Fire Insurance? How can a Fire Policy be taken out and from what moment of time does the risk in it begin to run?

19. What is meant by "Insurable Interest," "Premium," "a Policy" and "Reinsurance"?

20. (a) What is meant by an "insurable interest" in relation to fire insurance? Has the mortgagee of a house such an interest? Or a warehouseman in respect of his customers' goods? Or the holder of all the shares in a company in respect of the company's property?

(b) V agreed to sell property which he had insured to P. After the contract but before the completion of the sale, the property was destroyed by fire. Could P claim the benefit of the insurance?—(L.C.C.)

21. "A contract of fire insurance is a contract based upon the utmost good faith." Comment on this observation.

22. A insured for Rs. 2,000 his house worth Rs. 5,000 against fire. The house was damaged by fire and the total loss is estimated at Rs. 1,500. What amount can A recover from the Insurance Company?

23. A is insured against loss or damage by fire. A's fire breaks out in his premises and he attempts to save his furniture and valuables by removing them from the premises. Some of these are damaged whilst being removed or thrown out of the window and some are stolen whilst lying in the street. Can he recover for this damage and loss under the policy? Explain fully the reason for your answer.

—(C.C.S. FINAL.)

24. "The insurer, upon payment of the amount due, is entitled to be subrogated to all the rights of the assured" Explain the above rule with special reference to contracts of Fire insurance.

25. Is a Fire Insurance Policy a document of title? Can it be assigned? If so, how?

26. In Fire Insurance Policy what is generally understood by the expression "loss by fire"?—(B.COM.)

27. What is the value of an 'average clause' in a policy of Fire insurance?

N insured against fire his house worth Rs. 40,000 for Rs. 20,000. The house is partially burnt and the damage done to it is Rs. 8,000. N claims Rs. 8,000 from the underwriters who offer to pay Rs. 4,000. How will you decide N's claim?—(B.COM.)

## CHAPTER XIV

### MARINE INSURANCE

1. Define Marine Insurance. Explain the maxim "Marine Insurance contract is a contract of indemnity."

2. What does the term "insurable interest" mean in the case of a marine insurance policy? Besides the owners of the ship and the owner of the cargo who else can have insurable interest sufficient to take out such a policy?—(B.COM., BOMBAY.)

3. How is the contract of Marine Insurance effected on the Lloyds? What is (a) a slip, and (b) a cover note? Have they any legal force?

4. (a) Explain with reference to Fire and Marine insurance: (1) Insurable Interest. (2) Subrogation. Give instances.

(b) A and B are brother and sister. Can A be said to have insurable interest in B and vice versa? Give reasons.

(c) Distinguish between Re-insurance and Double insurance.

—(B.COM., BOMBAY.)

5. Write short notes on: (a) Proximate cause in a Marine Insurance Contract, (b) Abandonment, (c) Warranty of Seaworthiness.

—(B.COM., BOMBAY.)

6. What is the difference between a Time Policy and a Voyage Policy in Marine Insurance? Is there any implied warranty in either policy as to the fitness of the vessel insured? If so, what is the nature and the extent of the warranty?—(INC, ACCTT.)

7. State what principle of the Law of Marine Insurance the valuation clause in the "Lloyds" policy lays down. In a valued policy, what items is the insured entitled to include while arriving at the value of his goods? Would it make any difference if the valuation was to be made in case of loss on an open policy?—(S.COM.)

8. What is the meaning of "deviation" in marine insurance? When is it excused?—(L.C.C.)

9. Explain carefully the words "perils of the sea." *S. S. Airdale* sailed from Amsterdam for Bombay. Owing to the negligence of the ship's crew, she came into collision with another ship and a portion of her cargo was lost. State whether the loss suffered by the owner of the cargo would fall within the meaning of loss arising from perils of the sea in a bill of lading.—(S.COM.)

10. Explain and illustrate what you understand by a warranty in a Policy of Insurance.—(L.S.)

11. (a) Explain "Warranties." What part do they play in "Marine Insurance"?

(b) Discuss, explaining the terms, the following:—  
"Frustration of adventure" and 'commercial impossibilities' are the pleas which are very often taken up by the parties to a 'Marine Insurance'.—(S.COM., I.M.C.)

12. What principle does the "Sue and Labour clause" in a Marine Insurance Policy lay down? Discuss fully.

13. Explain with reference to Marine Insurance contract:—(a) F. P. A. clause in the Policy, (b) Difference between Re-insurance and Double insurance, and (c) Average.

14. Distinguish Total from Partial loss. What are the liabilities of Underwriters (1) where a ship is totally lost, (2) where it is only partially lost? Explain what is meant by Constructive Total loss.

—(R.A. FINAL.)

15. What is understood by "Insurance against total loss" in a Marine Policy? Into how many classes is total loss divided? What documents are necessary to substantiate a claim for such loss?

—(S.COM., BOMBAY.)

16. Explain:—

(a) Bottomry Bond. (b) Salvage. (c) Particular Average.

—(S.COM., CALCUTTA.)

17. Explain "Average Statement," "Jettison," "Barratry," "A cover Note," "Loss by fire."

18. (a) Explain an 'open policy' giving one illustration.

(b) Explain 'Abandonment' and 'Subrogation' and their relation.

—(S.COM., I.M.C.)

19. How does the doctrine of subrogation apply to contracts of insurance?—(L.C.C.)

20. Discuss the principle of subrogation as applied to a contract of marine insurance, and its effect upon the liability of the insurer.

Two ships A and B belonging to different owners came into collision which was due to the negligence of those in charge of B. The

owner of A has insured her for £75,000, and receives £10,000 as damages from the owner of B. How much can he recover from his insurer?

Suppose in the above case both vessels had belonged to the same owner, how much could he have recovered from the insurer of vessel A in respect of the said insurance of £75,000?—(S.COM., BOMBAY.)

21. Explain the maxim—*Causa proxima non remota spectatur*.

22. Can a Marine Insurance contract be assigned? If so, how?

23. What is the difference between a general average loss, a particular average loss and particular average charges? Explain how far such losses and charges may be recovered by an assured under a Lloyd's Policy in the usual terms.—(C.C.S. FINAL.)

24. What is meant by "General Average"? Cotton is shipped by A under bills of lading excepting jettison and stranding. Some of the cotton is stowed on deck. The ship strands, and the deck cotton is properly jettisoned. Is A entitled to general contribution? Is he entitled to recover the value of the cotton from the shipowner?

25. A ship sails with a general cargo from Calcutta to London. On the voyage, part of the cargo is found to have heated, so that it is worthless, and is thrown overboard by the master. If it had been kept on board, it would have endangered the rest of the cargo and the ship. Has the owner of the cargo any claim against the other cargo-owners and the shipowners? Has the shipowner any claim against the other cargo-owners for loss of freight?—(INC. ACCTT.)

26. Discuss the question of Salvage. Is salvage payable for saving the passengers from a wreck? What is the "Contribution clause" in a Fire Insurance Policy?—(C.C.S. FINAL.)

27. A steamer is chartered by T "now at sea having sailed one month back" to sail to Sydney and there load a cargo. The steamer had not in fact sailed "one month back." Is T entitled to avoid contract? Give reasons.—(S.COM.)

## CHAPTER XV

### COMMON CARRIERS AND CARRIAGE OF GOODS BY LAND, AIR & SEA

1. What is a "Bill of Lading," and by whom is it usually signed? Distinguish it from a "mate's receipt."—(S.COM., BOMBAY.)

2. (a) What is the difference between a Bill of Lading and a Charter Party?

(b) Explain "Act of God", "Restraint of Princes", "Accidents of the Seas", and "Custom of the Port".

3. What is a "Through Bill of Lading"? What is a "Respondentia Bond"?

4. Explain: (i) 'Always afloat', (ii) 'Lay Days' and (iii) 'Demurrage'.—(S.COM., L.M.C.)

5. Distinguish a Charter-party from a Bill of Lading. By a Bill of Lading goods are shipped by A deliverable to B or assigns. Freight is payable on delivery. The Bill of Lading is negotiated for value by endorsement and delivery with the intention of passing the property

in the goods, and so comes in the hands of E. Is B or E liable for the freight? Can E recover against the shipowner if the goods are lost on the voyage?—(INC. ACCTT.)

6. A ship carrying goods under a Bill of Lading, deviates on the voyage. Discuss the legal liability of the shipowner in consequence of such deviation.

7. State the importance of the clause relating to (1) Seaworthiness, (2) Negligence, in a Charter party. What is meant by "Deviation" on the part of a ship and how does it affect the liability of an underwriter?—(S.COM.)

8. What is a Charter-party? How does it differ from a Bill of Lading? Is a charterer who has undertaken to load a cargo of barley at a foreign port excused by the fact that—

- (a) the ship is unseaworthy;
- (b) the foreign country prohibits the exportation of barley;
- (c) war breaks out between his country and the country in which the foreign port is situate?—(INC. ACCTT.)

9. What is meant by the "shipowner's lien"? When does it arise, and how far does it depend on "possession" of the goods in respect of which it arises?

10. A ship, carrying goods under a Bill of Lading, deviates on the voyage. Discuss the legal liability of the shipowner in consequence of such deviation. Is he liable for the loss of goods by a peril excepted in the Bill of Lading—

- (a) when the loss is directly attributable to the deviation;
  - (b) when the loss is in no way connected with the deviation?
- (INC. ACCTT.)

11. Explain—

Dead freight. Lay days. Salvage. General Average. Clean Bill of Lading.—(S.COM.)

12. Explain the meaning of the terms "freight", "dead freight", "back freight", "freight pro rata", "contingency freight".

When is a shipowner entitled to recover full freight?

—(S.COM., BOMBAY.)

13. Explain the terms:—Perils of the sea, and a Contract of Bottomry.

14. Explain the effect of the "excepted perils clause" in a charter party. How does it affect the protection given to the shipowner by this clause, if he deviates from his course, and in what cases is such deviation allowed?

15. What is the purpose of a Bill of Lading in a contract of freightage?—(S.COM., BOMBAY.)

16. Explain "Freight payment", "Dead freight", "Primage", "Lay days" and "Negligence clause" in shipping agreements of hire.

17. What do you understand by (a) Charter-party, (b) Marine Insurance, (c) Insurable Interest, (d) Drawee in case of need, and (e) Holder in due course?

18. Explain "Assignment of Policy", "General Average", "Bottomry Bond", "Bill of Lading" and "Documentary Bill".



19. What is the effect of the assignment of a Bill of Lading by the buyer of goods upon the vendor's right of stoppage in transit?

20. A sells and consigns goods to B of the value of Rs. 12,000. B assigns the Bill of Lading for these goods to C to secure the sum of Rs. 5,000 due from him to C, upon a general balance of account. B becomes insolvent. A has not received the whole price of the goods. Is A entitled to stop goods in transit?

21. A ships goods to Bombay and assigns the Bill of Lading to B, his agent there. He forwards this instrument by post with a letter to B containing instructions not to sell the goods without consulting A by wire as to the price. B sells the goods, without consulting A, to C and misappropriates the money. He then becomes insolvent. A stops the goods in transit but C claims them. Who will, in your opinion, succeed and why?—(S.COM.)

22. Under what circumstances is the master of a ship entitled to sell cargo, to tranship it or to raise money thereon?—(S.COM., BOMBAY.)

23. What is a contract of "Bottomry"? Discuss briefly the circumstances under which the master of a ship is entitled to sell damaged goods, to tranship goods, and to raise money on cargo.—(S.COM.)

24. State the circumstances under which the master of a ship can enter into contracts of *respondentia* or *bottomry* so as to bind the owner. To whom and by whom is freight payable?—(S.COM.)

25. "The common law liability of the shipowner as a carrier was precisely the same as that of a land carrier." Explain with a short note on the present-day liabilities of a shipowner.—(S.A. FINAL.)

26. State the powers of a master of a ship. How far can he bind the shipowner by his acts?

M, the master of a ship belonging to P, issues a Bill of Lading to B, the shipper, showing that 50 tons of coal have been received on board the ship. In fact only 25 tons of coal were put on board. The consignee to whom the Bill of Lading is assigned demands from the shipowner 50 tons of coal. What is the liability of the shipowner?

—(S.COM.)

27. (a) What are exceptions to the liability of the charterer?

(b) Explain: (i) 'lump-sum freight,' (ii) freight 'pro-rata' and (iii) 'contingency freight.'—(S.COM., I.M.C.)

## CHAPTER XVI

### INSOLVENCY LAW

1. State generally what persons are capable of being made bankrupt. Mention any exception to the general rule of which you are aware.—(INC. ACCT.)

✓ 2. Can (a) an infant, (b) a married woman, (c) a resident alien, (d) a lunatic, be adjudicated an insolvent?—(S.COM., BOMBAY.)

✓ 3. What is an act of Bankruptcy? What are the effects of an adjudication?—(S.COM., CALCUTTA.)

4. The general manager says to you: "A bankruptcy petition has been presented against Hodgson's. We are the biggest creditors, and the other creditors want us to look after the creditors' meeting.

I know nothing about such meetings: can you help me? Also, what is the position if the firm wants to give a proxy to vote at the meeting?" What would you tell him?—(L.S.M.A. DRT.)

5. (a) "Failure to comply with bankruptcy notice constitutes an act of bankruptcy on the part of the debtor." Explain the meaning of a "bankruptcy notice" in this connection. In what ways can the debtor comply with the notice and so avoid committing this act of bankruptcy? Can a bankruptcy notice be served on a married woman?

(b) The Persian Rug Company, Limited, has obtained judgment against A. Guy, a debtor, for £50, and execution is issued against his goods. A week later a receiving order is made against Guy. Can the Company retain the proceeds of the execution and, if so, what steps are necessary?

6. (a) What are acts of Insolvency?

(b) How can an Order of Adjudication be obtained by a debtor or by a creditor?

(c) What is an Interim Protection Order and how can it be obtained?—(L.L.B., BOMBAY.)

7. State the conditions on which an insolvency petition may be presented by a (1) creditor, (2) debtor.—(D.COM., L.M.C.)

8. What is a "Protection Order" and in what cases is it granted to an insolvent?—(D.COM., BOMBAY.)

9. "A" has had a Receiving Order in bankruptcy made against him; "B" has been adjudicated bankrupt. How is each affected?

—(A.A.I.A. FINAL.)

10. (a) Why and how is a person adjudged Insolvent? What is the effect of an order of adjudication? Does the effect vary in cases where an order is made in a Presidency Town or in the Districts?

(b) How is the property of an adjudicated Insolvent administered?—(R.A. FINAL.)

11. Describe all the incidents you may be aware of in connection with a scheme of Composition as proposed by an insolvent debtor and state the circumstances under which the Court may pass an order annulling a scheme already sanctioned by it.—(D.COM.)

12. When a receiving order has been made against a debtor at what time may he put forward a scheme or composition? In what circumstances may the Court refuse to approve such a scheme?—(L.C.C.)

13. A, a native of X State, which had not entered into any arrangement of reciprocity to accept the proceedings of the British Courts under the Insolvency Acts, was also dealing as a merchant in Bombay. B obtains a decree in the Bombay High Court for Rs. 10,000 against A who then filed his petition and was adjudicated insolvent. The Official Assignee was unable to obtain possession of A's assets in X State and A refused to assist him to do so. A obtained his discharge in January 1923. B in June 1923 commenced an action in the Court of X State, to recover the balance of the debt due to him. Will the Bombay High Court restrain B from proceeding with the action in X State?

14. In a Bankruptcy what assets are divisible amongst creditors though they do not belong to the Bankrupt?—(A.A.I.A. DRT.)

15. What, of the following, would be available for division amongst a bankrupt's creditors:—

- (a) A share in a partnership,
- (b) Property settled before marriage,
- (c) Property settled after marriage,
- (d) Shares in a private company where there is restriction upon transfer, and
- (e) Property held by the bankrupt as trustee?—(A.A.I.A. INT.)

16. Explain:—

(a) Reputed ownership, (b) Fraudulent preference, (c) Disclaimer of Leasehold Give instances.—(F.COM. BOMBAY.)

17. In what circumstances are goods said to be in the "reputed ownership" of a bankrupt? In your firm, being compelled in the course of business to deposit goods with A in circumstances which might lead to "reputed ownership", asked you how such a contingency could be guarded against, what steps would you advise?—(L.S.M.A.)

18. In January 1926, A who was making large profits in the Cotton Market, settled three lacs of rupees on his married daughter. In November 1927 there were crises in the Cotton Market and in December 1927 A was adjudicated an insolvent. Has the Official Assignee any claim against the 3 lacs of rupees settled on A's daughter? Give reasons.—(B.COM., BOMBAY.)

✓ 19. On what grounds can an "adjudication order" passed against an insolvent be annulled?

20. What are the steps in the procedure of making a person bankrupt?—(A.A.I.A. FINAL.)

21. At 15th June a customer owes your firm £65 for goods supplied; no definite terms of payment have been agreed with him. You learn that on 1st May he assigned the whole of his assets to a certain manufacturer who is the customers' principal supplier; you also learn that the customer has since gone abroad, and that the date of his return is uncertain. Would these facts support a petition in bankruptcy? Give reasons.—(L.S.M.A.)

22. Under a scheme of arrangement entered into by a debtor with his creditors the debts are payable by instalments. The Court duly approves of the scheme. Default is then made by the debtor in payment of an instalment. Is the creditor entitled:—

- (a) to sue for his debt as due originally,
- (b) to sue for the instalment due,
- (c) to take any other course and if so what proceedings for the recovery of his debt?—(B.COM., BOMBAY.)

23. (a) What proportion of the creditors must assent to a deed of arrangement with creditors for it to be valid?

(b) How are secured creditors and creditors whose debts do not exceed £10 treated in this respect?—(L.C.C.)

24. What is the position of a trustee under a deed of arrangement (i) if the debtor is adjudged bankrupt after its execution; (ii) which becomes void owing to the debtor having been insolvent when the deed was executed; (iii) which becomes void by reason of non-compliance with the requirements of the Act?

25. What do you understand by the doctrine of "Reputed Ownership"? At the date of his adjudication a bankrupt has in his possession: (a) certain fixtures, (b) shares in Harrold's Limited, (c) furniture comprised in a registered Bill of Sale, (d) a motor car under a Hire-Purchase Agreement. Are any, and if so which, of the above "goods" in his "Reputed Ownership"?—(INC. ACCTT.)

26. A, prior to his bankruptcy, entered into a binding contract to sell certain leasehold property. The contract was made *bona fide*, but the price obtained was inadequate. On A becoming bankrupt the trustee, finding he could obtain a better price, desired to get rid of the contract. Point out clearly what is the trustee's position in the matter, and what right (if any) the purchaser has of enforcing his contract against the trustee.—(INC. ACCTT.)

27. A married woman, possessed of separate property subject to a restraint on anticipation, is lessee of a shop where she carries on business as a costumier. Last year, being in financial difficulties, she borrowed £500 from her husband for the purpose of her business. On April 21st, 1915, she was adjudicated bankrupt. The rent due on the last two quarter days is unpaid. Has the trustee in bankruptcy any rights against her separate property? Can the lessor distrain for any of the rent? Can her husband prove in the bankruptcy for the £500?—(INC. ACCTT.)

28. What is Fraudulent Preference and what is its effect on insolvency?

Mention and discuss some transactions or transfers which would be protected as *bona fide*.—(LL.B., BOMBAY.)

29. (a) X, a bankrupt, is in receipt of a salary of £100 per month as a film actor. How far is X allowed to regard this as his own for the upkeep of himself and his family?

(b) In the bankruptcy of J. Smith it is found that the debtor, a short time before, repaid his friend Jones a loan of £100. The trustee in bankruptcy claims to set aside this payment. What must he prove before he can do so?

30. A trader in insolvent circumstances executed a deed purporting to be a general assignment of all his property to trustees for the benefit of his creditors. Is the assignment valid and has the trader thereby committed an "act of insolvency"?

31. A trustee misappropriates money held by him for the benefit of B and C. Subsequently he files a petition and is adjudicated insolvent. Two days before the insolvency he executes a deed whereby he conveys certain immovable property belonging to him to F upon trust to raise money and ratify the breach of trust. Neither B nor C is aware of the deed or of the breaches of trust. Is the deed void as against the Official Assignee?

32. (a) An insolvent debtor assigned his business and property to a private limited company, of which he became managing director. What steps could the creditors take?

(b) Subsequently the company, finding itself in difficulties, went into liquidation and the liquidator sold the assets to a *bona fide* purchaser. Have the creditors any remedy?

—(L.C.C.)

33. When can an insolvent apply for his discharge, and what must the Court consider on the hearing of the application? State briefly what is the effect of an order of discharge.—(A.COM., BOMBAY.)

34. What are powers of the Official Assignee as to realisation of an Insolvent's property?—(B.COM., BOMBAY.)

35. How is the trustee in bankruptcy appointed? State four powers of the trustee which he can only exercise with sanction, and the sanction required.—(A.A.I.A. FINAL.)

36. What are the rights of a trustee in bankruptcy to (a) property acquired, (b) salary earned by the bankrupt after the Adjudication Order?—(A.A.I.A. FINAL.)

37. How should a trustee in bankruptcy deal with proofs for:—

- (a) damages for tort;
- (b) an annuity terminable on remarriage;
- (c) the price of goods sold to the bankrupt when the vendor had notice of an act of bankruptcy; and
- (d) a claim for alimony?—(L.C.C.)

38. What property of a bankrupt is not divisible among his creditors?—(L.C.C.)

39. Under what circumstances and how can (1) an insolvent, and (2) a creditor, apply for the annulment of the Order of Adjudication?—(LL.B., BOMBAY.)

40. Under what circumstances would the Court order that the Insolvent's estate be administered in a summary manner? What is the difference between such summary administration and the ordinary administration under the Insolvency Act?—(LL.B., BOMBAY.)

41. Can an undischarged principal ever sue on a contract made by his agent? If so, under what circumstances can he sue?

—(C.C.S. FINAL.)

42. (a) It is a general rule that an order of discharge in bankruptcy puts an end to all debts provable in the bankruptcy. What exceptions are there for this rule?

(b) X, a bankrupt, applies to the Court for his discharge. His liabilities (all unsecured) were £1,000 and his assets £200, and a dividend has been duly paid. X has excellent prospects of earning considerably sums for the future but only if he gets his discharge. Can the Court do anything to secure more for the creditors?—(I.S.M.A.)

43. (a) What matters should the Court take into consideration in dealing with an application for discharge of an Insolvent?

(b) What is the effect of an Order of Discharge in Insolvency?

(c) Are there any and, if so what, debts from which an Order of Discharge will not release the Insolvent?—(LL.B., BOMBAY.)

44. In bankruptcy what orders has the Court power to make when the bankrupt applies for his discharge?—(A.A.I.A.)

45. D enters into a contract in his own name. Is Parol Evidence admissible either for the purpose of discharging him from liability or for the purpose of charging an undischarged principal in the contract?

—(C.C.S. INT.)

46. What is the effect of a discharge from bankruptcy? When may a bankrupt apply for his discharge, and how is application for such discharge made? State briefly the procedure.

47. When is the public examination of a debtor held? Who may question the debtor at the public examination? If, on his examination,

the Court is of opinion that the debtor is failing to disclose his affairs, what course is open to the Court?—(INC. ACCTT.)

48. A bankrupt wishes to obtain his discharge. State shortly (a) the steps he must take to obtain such order, (b) the effect of the order when obtained.—(INC. ACCTT.)

49. Explain carefully the position of a bankrupt as to property acquired by him after his bankruptcy, and (a) before his discharge, (b) after his discharge.—(INC. ACCTT.)

50. A trading firm, adjudged insolvent by the Bombay High Court owns in Shanghai certain movable and immovable property, which is in the possession of a British subject there. Can the Official Assignee in Bombay take charge of that property, and if so, how should he proceed?

51. AB of Madras turns his business of motor car dealer into a Private Limited Company called 'Cars Limited' in which he holds 99 shares and his son 1 share. AB continues his business in Musical Instruments under the name of AB & Co., in which he makes losses and is ultimately adjudged insolvent. Has the Official Assignee any legal or practical claim against the assets of 'Cars Limited'?

52. A, an insolvent, has incurred the following amongst his other debts:—

Rs. 500 to the Bombay Municipality for Municipal taxes,

.. 500 to his clerk for five months' salary at Rs. 100 per mensem.

.. 500 to his banker under an overdraft, .

.. 300 to his landlord for three months' rent at Rs. 100 per mensem.

.. 125 to his servant for five months' wages at Rs. 25 per mensem.

Are the above debts or any portions thereof payable in priority to A's other debts?—(S.CO., BOMBAY.)

53. A, who possesses both movable and immovable property in Karachi, Port Okha, Bombay, Goa and Colombo is adjudged insolvent by the Bombay High Court. Which of these movable and immovable properties vest in the Official Assignee?

54. MN, a resident in Calcutta, was adjudicated on his own petition. He had three creditors only, two being fully secured by mortgage on his immovable property. The third who was unsecured after negotiation accepted Rs. 1,000 from MN's father in full satisfaction of his claim of Rs. 7,500. Can MN withdraw his petition if the creditors agree?

55. In Bankruptcy, on what grounds can a payment made by the bankrupt before the commencement of the bankruptcy be impeached on the ground of fraudulent preference?

A, a debtor, informs his creditor that he is about to go bankrupt and the creditor threatens him with an action. Is it a fraudulent preference which the Courts will set aside if the debtor then pays the creditor the amount of the debt?

56. In Bankruptcy, what power has the trustee in bankruptcy to disclaim property belonging to the bankrupt, which is burdened with onerous covenants? Within what time must he decide whether to exercise this power or not? What special provision is made for the case of burdensome lease held by the bankrupt?

## CHAPTER XVII

## ARBITRATION

1. What is the object of an arbitration and how is it accomplished?
2. Very briefly summarise the principal provisions of the Arbitration Act, 1889.—(C.C.S. FINAL.)
3. What is the general rule as to the persons who may refer matters to arbitration? State and discuss the exceptions to the rule.  
—(INC. ACCTT.)
4. What is meant by submission to arbitration? What are the different modes of submission?—(B.COM., L.M.C.)
5. What is the effect of a submission to arbitration on an action?  
—(B.COM., CALCUTTA.)
6. Can a person who has no interest of his own in the matter in dispute, refer such dispute to arbitration? If so, in what cases?  
—(INC. ACCTT.)
7. Can a partner in a firm submit a dispute relating to the business of the firm to arbitration, compromise a claim by the firm or withdraw a suit filed on behalf of the firm so as to bind the firm?
8. Can a joint stock company refer to arbitration any existing or future dispute between itself and another Company?
9. What is necessary to constitute a "Submission" to arbitration? Can a Submission once made be revoked? If so in what manner and on what grounds?—(INC. ACCTT.)
10. How far, if at all, can matters of a criminal nature be referred to arbitration?—(INC. ACCTT.)
11. What disqualifies a person from being appointed an arbitrator?
12. State under what circumstances a Court can appoint an arbitrator, umpire or a third arbitrator.—(M.COM. CALCUTTA.)
13. What are the duties of arbitrators? And what is meant by "misconduct" of an arbitrator?
14. What acts constitute misconduct in law on the part of an arbitrator?—(B.COM., L.M.C.)
15. What is the effect on a Submission of the death or bankruptcy (a) of an arbitrator, (b) of any party to the Submission?  
—(INC. ACCTT.)
16. What is a valid award?
17. How can an award be modified or corrected? When is it set aside?
18. (a) In what cases can Civil Courts appoint arbitrators? Describe the procedure for such appointment.  
(b) Where two arbitrators were appointed and one of them was absent at one only of many sittings, that sitting being an unimportant one, and where the award was given jointly, and one of the parties objected to it, would it be liable to be set aside? Give reasons for your reply.—(B.A., FINAL.)
19. What powers can an arbitrator exercise under the (Indian Arbitration) Act?

20. Trace the course of an arbitration from its start to its end.
21. Summarise the powers and duties of an arbitrator as to (a) proceeding *ex parte*, (b) admitting or rejecting evidence, (c) stating a case upon an incidental point of law, (d) stating his whole award to the Court in the form of a special case.—(INC. ACCTT.)
22. What powers (if any) are given by the Arbitration Act, in respect of (a) administering oaths, (b) stating a special case, (c) correcting errors in the award?—(INC. ACCTT.)
23. Describe briefly the mode of procedure at a reference. For what purposes and within what limits may the parties, or the arbitrator, employ professional assistance?—(INC. ACCTT.)
24. When, if ever, can specific performance of an award be obtained?—(INC. ACCTT.)
25. Point out carefully the rights of a party to a Submission (if any) against an arbitrator who—
  - (a) refuses to deliver up an award until an exorbitant fee is paid;
  - (b) is guilty of (i) want of care, (ii) want of skill;
  - (c) declines to make any award at all;
  - (d) makes a corrupt award.—(INC. ACCTT.)
26. State all the rules you know with reference to—
  - (a) fixing the amount;
  - (b) enforcing payment of the remuneration of an arbitrator.—(INC. ACCTT.)
27. When is an arbitrator bound to file an award made by him in the Court? What is the effect of filing the award in the Court?
28. What power has the Court (a) to enlarge the time for making an award, (b) to set aside an award? Within what time, and in what manner, must an application to set aside an award be made?—(INC. ACCTT.)
29.
  - (a) What is Submission? May it be revoked?
  - (b) In what cases may an award be set aside by the Court?
  - (c) A and B refer certain disputes between them to an arbitration of X or Y or both. X alone hears the parties and makes his award. Is this a good award?
30. A and B agree to refer the matters in dispute between them to C and D as arbitrators, and if C and D do not agree to F as umpire. There is no provision in the submission as to the time within which the award should be made. Within what time should the award be made?
31. State the provisions of the Indian Arbitration Act, as to—
  - (a) the limit of time for making an award,
  - (b) stay of suits.
32. At what time does the authority of an umpire commence, and what is the duration of his authority? Before the time of making an award has elapsed, arbitrators disagree and refuse to make an award. Is an umpire entitled to proceed at once with the reference? If he does, what will be the effect of his award? Will it make any, and if so, what, difference to your answer, in case the arbitrators subsequently agree and make an award within the time allowed to them?—(INC. ACCTT.)



33. How can the parties to an arbitration compel the attendance of a material witness? Can an arbitrator order the evidence of a material witness, who is abroad, to be taken on commission? Can an arbitrator himself call and examine a witness if either party objects? If a witness before an arbitrator should give false evidence, would he be liable to any offence, and liable to punishment in any manner?

—(INC. ACCTT.)

34. Explain briefly the statement that an arbitrator's award must be certain, final, reasonable and possible.—(L.C.C.)

35. What rule applies where an award is silent as to certain matters which form part of the matters submitted?—(INC. ACCTT.)

36. In what cases may an award made under the Indian Arbitration Act, 1899, be set aside and in what cases may it be remitted to the re-consideration of the arbitrators?

37. In what ways can a creditor enforce a judgment, or an award made in an arbitration, against his debtor?—(L.C.C.)

## CHAPTER XVIII

### LIMITATION AND STAMPS

#### LAW OF LIMITATION

1. State the law of limitation relating to disabled and minor persons.—(S.COM., BOMBAY.)

2. What are the provisions of the Limitation Act with regard to the computation of the period of limitation in case of persons under disability?—(S.COM., BOMBAY.)

3. From what date does the period of limitation commence to run in a suit based on a fraud?—(S.COM.)

4. A sues B for recovery of a debt of Rs. 5,000. The suit is time-barred, but B does not plead limitation. Will the Court entertain and decide the suit, or dismiss it on the ground of limitation? Is there any difference on the point between Indian and English laws?

5. Under what circumstances would (i) an acknowledgment of liability and (ii) a payment of interest on a debt, extend the period of limitation?—(S.COM. BOMBAY.)

6. Sorabji & Co., a partnership firm, whose partners are Sorabji, Rustomji and Nagarji, sold to A goods worth Rs. 1,000 on 1st January 1930. Sorabji is insane. Nagarji, who is a minor, manages the business, and Rustomji is in England. The debt remains unpaid till 31st July 1935 when Rustomji returns to India. On a suit brought against A by Sorabji & Co., on 5th August 1935, A pleads limitation. Is the defence valid?

7. A, a minor, B, an insane person, both are owed Rs. 2,000 each by C, in 1930. B dies insane in 1935 when A is only 16. X (who is 17) is appointed an executor of B's estate two months after his death. From what point of time will period of limitation begin to run in each case, supposing the debts are still unpaid in 1935?

8. What is the rule in connection with the computation of the period of limitation in case where (a) a defendant is absent from British India. (b) the plaintiff has been kept from instituting a suit

from want of knowledge, or (c) the plaintiff could not institute a suit for want of a document kept away from him through fraud.—(A.C.M.)

9. D owes Rs. 5,000 to X and Rs. 2,000 to Y. The debts were incurred in 1928 and were unpaid till 1935. D, however, paid regularly annual interest at 5 per cent to X. D has paid no interest to Y, but has passed an IOU in January 1935. Is any of the debts barred by limitation? Give reasons.

10. (a) When a debt is statute-barred, is a payment on account by a partner, or a former partner, sufficient to revive the right of the creditor to sue all the debtors?

(b) Where a debtor sends a payment in respect of a statute-barred debt, with a letter stating that the amount is paid in settlement of the larger sum due, can the creditor sue for the balance?—(L.C.C.)

11. A sold goods to B on 1st January 1936 to be paid for six months after delivery. Goods were delivered on 5th March 1936. From what point of time will limitation period begin to run?

12. Determine the period of limitation and the time from which such period begins to run in each of the following cases:—

- (a) For repayment of money lent on a demand promissory note.
- (b) For a bill of exchange or promissory note payable at a fixed time after date
- (c) For call on shares made by a company registered under the Indian Companies Act

#### LAW OF STAMPS

13. When are instruments executed out of British India to be stamped?

14. Can a Promissory Note, executed out of British India and not adequately stamped, be made available by a holder in British India? If so, under what circumstances?

15. Define a Promissory Note Is an IOU liable to stamp-duty?

16. Is the following document a Promissory Note? What stamp duty, do you think, will such a document require?

"I promise to pay Mr. H. or his order, on demand, a sum of Rs. 500 for which I agree to give him 7 p.c., per annum: and also to give him my life-policy, etc., in default of payment."

17. If a foreign contract is not stamped according to the law of the place where it was executed, how is it to be treated by Courts in British India?

18. If an alteration is made in an instrument after it has been duly stamped and executed, will such alteration require a new stamp?

19. Does the Indian Stamp Act throw an obligation on a person receiving a sum of money or any other thing, to give a stamped receipt to the person giving the same?

20. Distinguish between a Bond and an Agreement for the purposes of the Stamp Act.

21. Define with reference to Indian Stamp Act—Bond, Cheque, Conveyance, Policy of Insurance and Power-of-Attorney, and state what stamp duty is payable on a Power-of-Attorney

22. What stamp is necessary for a receipt in case of money paid and received? What is the result if (i) no stamp or (ii) insufficient stamp is affixed?—(S.COM., BOMBAY.)

23. Define Receipt. Is an advertisement acknowledging receipt of money by the proprietor of a newspaper liable to stamp duty?

24. Has the Court power to overhaul an account-book produced in a case for the purpose of putting in evidence of an entry contained in it, and take action under the Stamp Act in regard to entries not put in evidence?

25. A sends more than Rs. 20 by Postal Money Order to B. B signs the Money Order Acknowledgment and hands it over to the postman. A afterwards demands a second stamped receipt from B, which B refuses to give. B is convicted of refusing to give a stamped receipt under Section 65 of the Stamp Act. Is the conviction legal?

26. What is the value of stamp required to be affixed on the following mercantile instruments?—

(1) Shares of a Joint Stock Company. (2) Articles of Association of a Company (3) Bills of Lading. (4) Charter-party. (5) Proxy. (6) Agreement for the sale of goods or merchandise exclusively.

—(S.COM.)

27. What stamp duty is payable on the following documents?—

(a) Demand promissory note,

(b) Deed of partnership,

(c) Receipt.—(S.COM., BOMBAY.)

28. What stamp is required for each part of the set of bill of exchange for Rs. 5,000 drawn in set of two and payable 6 months after sight?—(S.COM., BOMBAY.)

29. What stamp would a Deed of Sale for Rs. 1,150 bear under the Indian Stamp Act?

30. A, having goods in a warehouse, borrows Rs. 1,000 upon their security from B and executes a document to that effect and hands over the key of the warehouse to B. What is the proper stamp for the document?

31. B pleaded limitation in a suit by A. A produced a letter from B which was an acknowledgment under the Limitation Act. B objected on the ground of its not being stamped. Is the objection valid?

32. What is the presumption as to stamp in case of a lost document?

33. What stamp duty is payable on the following?—

(a) A deposit receipt for Rs. 500 in the Bank of Bombay.

(b) A receipt for a donation of Rs. 100 to hospital.—(S.COM.)

34. State fully the essentials of a valid acknowledgment to save limitation.—(S.COM.)

35. Give instances in which time is excluded in legal proceedings.  
—(S.COM.)

36. What is the value of the stamp on?—

Charter-party; Protest of a Bill or Note; Instrument of Partnership?—(S.COM.)

## CHAPTER XIX

### MORTGAGES AND CHARGES OF IMMOVABLE PROPERTY

1. What is a Mortgage? Give the difference between a Simple Mortgage and a Legal Mortgage.—(S.COM.)

2. Describe and discuss the following:—(a) Usufructuary Mortgage. (b) English Mortgage. (c) Fraudulent Preference.—(S.COM.)

3. What remedy is open to a mortgagee if the mortgage-money is not paid by the mortgagor?—(S.COM.)

4. (a) What is an equitable mortgage? What are its conveniences from the businessman's point of view? Is an English mortgage to be preferred to it as a security and, if so, why?

(b) A and B are the joint owners of a property. Their shares are unequal: A is entitled to a three-fourths and B to a one-fourth share. Jointly they mortgage the property to X for a lac of rupees in 1920. In 1925, B tenders Rs. 25,000 with interest to X and wishes to redeem his share

Can he do so? Are there any exceptions to the general rule?

—(S.COM., BOMBAY.)

5. Explain fully—(i) Equity of Redemption (ii) Tacking. (iii) Equitable Mortgage.—(S.COM.)

6. What is a mortgage and how can it be effected?

Discuss briefly the mortgagor's right to redeem.—(S.COM., BOMBAY.)

7. What legal formalities are to be observed in case of a mortgage-deed by which Rs. 100 or upwards are secured? What is the effect of such an instrument at law if those formalities are not observed?

8. What are the characteristics of a mortgage by conditional sale?

What is the mortgagee's remedy in the event of the mortgagor failing to pay the mortgage-money on the due date?

What is the period of limitation for bringing a suit on a mortgage by conditional sale?—(S.COM., BOMBAY.)

9. Discuss—(a) Equitable Mortgage. (b) Doctrine of Marshalling.

What are the rights and liabilities of a mortgagee under an English mortgage?—(S.COM., BOMBAY.)

10. A mortgaged two houses, one to B by deed, the other to C by mere deposit of the deeds. A made default in each case entitling B and C to enforce their respective securities. State what remedies B and C respectively have.

11. Discuss the rights and liabilities of a mortgagor in respect of the mortgage-property as well as towards the mortgagee.

12. Are there any, and if so, what, implied contracts deemed to have been entered into by a mortgagor while executing the deed? In case any of the implied contracts are broken by the mortgagor, what are the rights of the mortgagee towards him?

13. Discuss fully the rights and liabilities of the mortgagee.

14. What is meant by "Right to Foreclosure"? When and how can a mortgagee exercise this right?

15. Distinguish clearly between (a) a mortgage, and (b) a charge.
16. Can the mortgage-property be sold by the mortgagee without intervention of the Court? If so, when?
17. Explain fully what are the rights of a subsequent mortgagee.
18. In case of mortgage of movable property—(1) Is registration necessary? (2) Is writing necessary? (3) To whom does the property in the goods pass? (4) With whom does the possession of the goods remain?
19. (a) Explain fully (i) suit for redemption; (ii) suit for foreclosure. Can the latter suit be brought after a decree in the first suit?  
(b) State the cases in which a mortgagee has a right to sue for mortgage-money.—(S.COM.)
20. What is the Preliminary decree in a mortgage suit? When is a mortgagee entitled to sue the mortgagor personally?—(S.COM.)
21. In what cases has the mortgagee of an immovable property a right to sue for the mortgage-money alone without claiming any relief against the mortgaged property? Can the mortgagee attach the mortgaged property and bring it to sale in execution of any decree in such suit for the mortgaged-moneys alone?—(S.COM., BOMBAY.)

## CHAPTER XX

### TRADE MARKS, DESIGNS, PATENTS AND COPYRIGHTS

1. What is a Trade Mark? What information need be supplied for registration of a Trade Mark?
2. What is the effect of registration of a Trade Mark?
3. Can Trade Marks be assigned? Describe the procedure of assignment of registered Trade Marks and state whether unregistered Trade Marks can be assigned.
4. What is a Patent? Who can apply for and oppose to grant of a Patent?
5. When does a Patent expire? Can the time be extended? If so, how and in what circumstances?
6. A shopkeeper sells goods which are in fact an infringement of a patent. He is subsequently sued by the owner of the patent who claims an injunction and damages. The shopkeeper pleads ignorance of the existence of the patent. Can the owner of the patent succeed?  
(L.C.C.)
7. Define "Copyright" Can it be assigned? If so, during what period and by whom?

## CHAPTER XXI

### INDUSTRIAL LAW

1. State what advantages a Trade Union and its members enjoy on registration of the union under the Indian Trade Unions Act.  
—(S.COM., BOMBAY.)

2. When is a strike or lock-out illegal?

What method is laid down in the Workmen's Compensation Act for calculating monthly wages of a workman?

3. What is the exact difference between total and partial disablement under the Workmen's Compensation Act? State briefly under what circumstances a relationship of master and servant exists to fall under this Act.—(S.COM., AGMA.)

4. During the course of proceedings under the Workmen's Compensation Act the parties to the dispute arrive at an amicable agreement, and ask the Commissioner to record it and to pass a decree in terms thereof. Can he do so?

What are the circumstances under which a workman can sue his employer under the Workmen's Compensation Act?—(S.COM., BOMBAY.)

5. When, under the Workmen's Compensation Act, 1923, is an employer discharged from liability to pay compensation to his workmen in respect of accidents arising out of the employment?

—(S.COM., BOMBAY.)

6. A, who is in the service of a paint manufacturer, contracts lead-poisoning during service. Can he claim compensation from his employer?—(S.COM., BOMBAY.)

7. What are the discretionary powers given to the Commissioner under the Workmen's Compensation Act regarding distribution of compensation amongst the dependants of a deceased workman, and from what order of the Commissioner will an appeal lie and where?

—(S.COM., BOMBAY.)

8. What defences are available to an employer against a claim under the Workmen's Compensation Act for compensation made by a workman in the employment?—(S.COM., BOMBAY.)

9. Briefly state the provisions of the Factories Act with regard to the employment of women and children.—(S.COM. BOMBAY.)

## CHAPTER XXII

### SOCIETIES REGISTRATION ACT

1. The C Hospital Association, a society incorporated under the Societies Registration Act, 1860, is supported partly by endowment funds and partly by annual grant from Government. The members wish to dissolve the Society. How can this be done?

2. What kinds of Societies can be registered under the Societies Registration Act, 1860? What are the special advantages of such a registration?

3. The Governing Body of a Society registered under the Societies Act, 1860, for the education of boys, wishes to include the education of girls. What are the necessary formalities?

4. The Ganges Tennis Club wishes to be incorporated. Can it do so (a) under the Societies Registration Act or (b) without the use of the word "Limited" under the Indian Companies Act?

5. On the dissolution of a society registered under the Societies Act, 1860, what is done with the surplus assets after paying its debts and liabilities?

# APPENDIX II

## THE INDIAN CONTRACT ACT, 1872

### (ACT IX OF 1872\*)

(Passed by the Governor-General of India in Council,  
25th April 1872)

(As modified up-to-date)

#### Preamble

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts. It is hereby enacted as follows:—

#### PRELIMINARY

#### Short title

1. This Act may be called the Indian Contract Act, 1872.

#### Extent and commencement

It extends to the *whole of British India* §; and it shall come into force on the first day of September 1872.

\* For the Statement of Objects and Reasons of the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6th, 1866, see *Gazette of India*, 1867, Extraordinary, p. 34; for the Report of the Select Committee, see *ibid*, Extraordinary, dated 28th March 1872; for discussions in Council, see *ibid*, 1867, Supplement, p. 1064; *ibid*, 1871, p. 313; and *ibid*, 1872, p. 527.

The chapters and sections of the Transfer of Property Act, 1882 (IV of 1882,) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX of 1872—see Act IV of 1882, s. 4. (For Act IV of 1882, see the revised edition, as modified up to 1st December 1905.)

§ Act IX of 1872 has been declared in force in—

The Santhal Paraganas—see the Santhal Paraganas Settlement Regulation (III of 1872), as amended by the Santhal Paraganas Justice and Laws Regulation, 1899 (III of 1899), s. 3;

The Arakan Hill District—see the Arakan Hill District Laws Regulation, 1874 (IX of 1874), s. 3. (Burma Code, Ed. 1899);

Upper Burma generally (except the Shan States)—see the Burma Laws Act, 1898 (XIII of 1898), s. 4 (1) [Burma Code, Ed. 1899];

[Contd. on next page]

## Enactments repealed

\* nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade nor any incident of any contract, not inconsistent with the provisions of this Act.

## Interpretation clause

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promiser," and the person accepting the proposal is called the "promisee";

(d) When, at the desire of the promiser, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promisee;

(e) Every promise and every set of promise, forming the consideration for each other, is an agreement;

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

(j) An agreement which is enforceable by law becomes void when it ceases to be enforceable.

British Baluchistan—see the British Baluchistan Laws Regulations, 1890 (I of 1890), s. 3. [Baluchistan Code, Ed. 1900.]

It has been declared by notification under s. 3(a) of the Scheduled Districts Act, 1874 (XIV of 1874) [General Acts, Vol. II, Ed. 1896], to be in force in—

the Taluk of the Province of Agra—see *Gazette of India*, 1876, Pt. I, p. 505;

the District of Hazaribagh, Lohardaga and Manbhum, and Paragana Dhalbhum and the Kolkhan in the District of Singhbhum—see *Gazette of India*, 1881, Pt. I, p. 504. (The District of Lohardaga included at this time the present District of Palamou which was separated in 1894. The District of Lohardaga is now called the Ranchi District—See *Calcutta Gazette*, 1890, Pt. I, p. 44.)

\* Repealed by Act X of 1914.

† But see s. 4, III. (b), *infra*.



## **CHAPTER I**

### **Of the Communication, Acceptance and Revocation of Proposals**

#### **Communication, acceptance and revocation of proposals**

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

#### **Communication when complete**

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete--

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

#### **Illustrations**

(a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete--

as against A, when the letter is posted ;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

#### **Revocation of proposals and acceptances**

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor but not afterwards.

#### Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A but not afterwards

#### Revocation—how made

6. A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party,
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed by the lapse of a reasonable time without communication of the acceptance;
- (3) by the failure of the acceptor to fulfill a condition precedent to acceptance, or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance

#### Acceptance must be absolute

7. In order to convert a proposal into a promise the acceptance must—

- (1) be absolute and unqualified
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time, after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise; but if he fails to do so he accepts the acceptance

#### Acceptance by performing conditions, or receiving consideration

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal

#### Promises—express and implied

9. In so far as the proposal or acceptance of any promise is made, in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

## CHAPTER II

## OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

**What agreements are contracts**

10. All agreements are contracts<sup>\*</sup> if they are made by the free consent of parties competent to contract, for a lawful consideration<sup>§</sup> and with a lawful object and are not hereby expressly declared to be void

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing<sup>†</sup> or in the presence of witnesses, or any law relating to the registration of documents<sup>‡</sup>

**Who are competent to contract**

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject,<sup>¶</sup> and who is of sound mind, and is not disqualified from contracting by any law to which he is subject

**What is a sound mind for the purposes of contracting**

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind

\* See s 2 cl. (h) *supra*.

§ See s. 25. Explan 2 and s 102, *infra*

† See, e.g., s 25 *infra*, the Indian Copyright Act, 1847 (XX of 1847), s 5 as modified up to 1st December, 1903; the Appendices Act, 1850 (XIX of 1850), s 8, as modified up to 1st May, 1865; the Conveyance of Land Act, 1854 (XXXI of 1854), ss 14 and 18; the Workman's Breach of Contract Act, 1859 (XIII of 1859), s. 4; General Acts, Vol. I; the Carriers Act 1865 (III of 1865), ss. 6 and 7, as modified up to 31st May, 1903; the Merchants' Shipping Act 1894 (57 and 58 Vict., c. 60), s. 24 (Collection of Statutes relating to India, Vol II); the Presidency Banks Act, 1876 (XI of 1876), s 9, as modified up to 1st March, 1907; the Transfer of Property Act, 1882 (IV of 1882), ss. 54, 59, 107 and 123 (for Act IV of 1882 see the revised edition as modified up to 1st December, 1905); the Indian Companies Act, 1882 (VI of 1882), ss. 6, 39, 46 and 67, as modified up to 1st August 1906.

‡ See now the Indian Registration Act, 1877 (III of 1877), revised edition, as modified up to 1st August, 1905.

¶ See the Indian Majority Act, 1875 (IX of 1875), as modified up to 1st May, 1906 For exception to this rule in the case of emigrants see ss. 8, 9 of the Assam Labour and Emigration Act, 1901 (VI of 1901); U. P. Code Vol. I, p 455; and s. 39 of the Inland Emigration Act, 1883 (XXI of 1883), as modified up to 1st December, 1902.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

### Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

### "Consent" defined

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

### "Free consent" defined

14. Consent is said to be free when it is not caused by

- (1) coercion, as defined in section 15, or
- (2) undue influence as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for existence of such coercion, undue influence, fraud, misrepresentation or mistake.

### "Coercion" defined (XLV of 1860)

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code<sup>§</sup> or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

*Explanation.*—It is immaterial whether the Indian Penal Code<sup>§</sup> is or is not in force in the place when the coercion is employed.

### Illustrations

A, on board an English ship on the high sea, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.<sup>§</sup>

A afterwards sues B for breach of contract at Calcutta.  
(XLV of 1860.)

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

\* But see s. 68, *infra*.

§ For Act XLV of 1860, see the revised edition, as modified up to 1st April, 1903.

**"Undue influence" defined**

16. § (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. (I of 1872)

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act 1872.

**Illustrations**

(a) A having advanced money to his son, B during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

**"Fraud" defined**

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,\*

§ This section was substituted for the original s. 16 by the Indian Contract Act Amendment Act, 1899 (VI of 1899), s. 2.

† See now the revised edition of the Act, as modified up to 1st September, 1906.

\* Compare, r. 233, *haja*.

with intent to ~~deceive~~ another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

*Explanation*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,§ or unless his silence is, in itself, equivalent to speech.

#### *Illustrations*

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A—"If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

#### **"Misrepresentation" defined**

18. "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

#### **Voidability of agreements without free consent**

19. When consent to an agreement is caused by coercion, . . . \*, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

§ See s. 143, *infra*.

\* The words "undue influence" were repealed by the Indian Contract Act Amendment Act, 1899 (VI of 1899), s. 3.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that she shall be put in the position in which he would have been if the representations made had been true.

*Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

*Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

### *Illustrations*

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

### **Power to set aside contract induced by undue influence**

19A.\* When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

### *Illustrations*

(a) A's son had forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A, for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

\* S. 19A was inserted by the Indian Contract Act Amendment Act, 1909 (VI of 1909), s. 3.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside ordering B to repay the Rs. 100 with such interest as may seem just.

**Agreement void where both parties are under mistake as to matter of fact**

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

*Explanation*—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact

*Illustrations*

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

**Effect of mistake as to law**

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

*After the establishment of the Federation of India this section applies in relation to Central Acts made for a Federated State as it applies to laws in force in British India.*

*Illustration*

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

\* \* \* \*

**Contract caused by mistake of one party as to matter of fact**

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

**What considerations or objects are lawful and what not**

23. The consideration or object of an agreement is lawful, unless it—  
is forbidden by law; or

---

† The second illustration was repealed by Act XXIV of 1917.  
§ See ss. 26, 27, 28, 30, *infra*.



is of such a nature that, if permitted, it would defeat the provisions of any law ; or

is fraudulent ; or

involves or implies injury to the person or property of another ; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

#### Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promises of each party are the considerations for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he had instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral,

(XLV of 1860.)

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.\*

### *Void Agreements*

**Agreements void, if considerations & objects unlawful in part**

✓ 24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

### *Illustrations*

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

**Agreement without consideration is void unless it is in writing and registered, or**

25. An agreement made without consideration is void, unless—

(1) It is expressed in writing and registered under the law for the time being in force for the registration of (documents),§ and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

is a promise to compensate for something done, or

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promiser, or something which the promiser was legally compelled to do, or unless

is a promise to pay a debt barred by limitation law

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.†

In any of these cases, such an arrangement is a contract.

*Explanation 1.*—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

*Explanation 2.*—An agreement to which the consent of the promiser is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into

\* For Act XLV of 1860, see the revised edition, as modified up to 1st April, 1903.

§ "Documents" was substituted for "assurances" by the Repealing and Amendment Act, 1891 (XII of 1891), as modified up to 31st May, 1902. For the law relating to the registration of documents, see the Indian Registration Act, 1877 (III of 1877), revised edition, as modified up to 1st August, 1905.

† See now the Indian Limitation Act, 1877 (XV of 1877), revised edition, as modified up to 31st December, 1900.

account by the Court in determining the question whether the consent of the promiser was freely given.

#### Illustrations

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

#### Agreement in restraint of marriage void

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

#### Agreement in restraint of trade void

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

#### Saving of agreement not to carry on business of which good-will is sold ;

*Exception 1.*—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

#### of agreement between partners prior to dissolution ;

*Exception 2.*—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

§ See now the Indian Limitation Act, 1877 (XV of 1877), revised edition, as modified up to 31st December, 1900.

or during continuance of partnership

**Exception 3.**—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

**Agreements in restraint of legal proceedings void**

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

**Saving of Contract to refer to arbitration dispute that may arise**

**Exception 1**—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. *Suits barred by such contracts*

*\*When such a contract has been made, a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.*

**Saving of contract to refer questions that have already arisen**

**Exception 2.**—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.†

**Agreements void for uncertainty**

29. Agreements, the meaning of which is not certain or capable of being made certain, are void.

#### *Illustrations*

(a) A agrees to sell to B “a hundred tons of oil”. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

\* The second clause of Exception 1 is repealed by the Specific Relief Act, 1877 (I of 1877), throughout British India. The clause is however, printed here in italics, because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

For Act I of 1877, see the revised edition, as modified up to 1st February, 1904.

† Cf. the Code of Civil Procedure (Act XIV of 1882), Pt. V, as modified up to 1st December, 1899; the Indian Arbitration Act, 1899 (IX of 1899); General Acts, Vol. VII, and the Indian Companies Act, 1882 (VI of 1882), ss. 206-211, as modified up to 1st August, 1904.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in cocoanut oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

### Agreements by way of wager void

30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

### Exception in favour of certain prizes for horse-racing

This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any place, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.\*

### Section 294A of the Indian Penal Code not affected (XLV of 1860)

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code<sup>§</sup> apply.

## CHAPTER III

### OF CONTINGENT CONTRACTS

#### "Contingent contract" defined

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

#### Illustration

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

\* Cf. the Gaming Act (8 and 9 Vict., c. 109), s. 18.

§ For Act XLV of 1860, see the revised edition, as modified up to 1st April, 1903.

### **Enforcement of contracts contingent on an event happening**

**32.** Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

- If the event becomes impossible such contracts become void.

#### *Illustrations*

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C died in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

### **Enforcement of contracts contingent on an event not happening**

**33.** Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

#### *Illustration*

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

**When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person**

**34.** If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingents.

#### *Illustration*

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

**When contracts become void which are contingent on happening of specified event within fixed time**

**35.** Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time becomes void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

**When contracts may be enforced which are contingent on specified event not happening within fixed time**

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not

happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

#### *Illustrations*

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

### **Agreement contingent on impossible events void**

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

#### *Illustrations*

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter, C. C was dead at the time of the agreement. The agreement is void.

## **CHAPTER IV**

### **OF THE PERFORMANCE OF CONTRACTS**

#### *Contracts which must be performed*

#### **Obligation of parties to contracts**

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisers in case of the death of such promisers before performance, unless a contrary intention appears from the contract.

#### *Illustrations*

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

#### **Effect of refusal to accept offer of performance**

38. Where a promiser has made an offer of performance to the promisee, and the offer has not been accepted, the promiser is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :—

- (1) It must be unconditional ;
- (2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;
- (3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promiser is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

#### *Illustration*

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

#### **Effect of refusal of party to perform promise wholly**

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract\* unless he has signified by words or conduct, his acquiescence in its continuance.

#### *Illustrations*

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

#### *By whom Contracts must be performed*

#### **Person by whom promise is to be performed**

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promiser himself, such promise must be performed by the promiser. In other cases, the promiser or his representatives may employ a competent person to perform it.

\* And see s. 75, *infra*.



*Illustrations*

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

**Effect of accepting performance from third person**

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promiser.

**Devolution of joint liabilities**

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

**Any one of joint promisers may be compelled to perform**

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any (one or more)\* of such joint promisers to perform the whole of the promise.

**Each promiser may compel contribution**

Each of two or more joint promisers may compel every other joint promiser to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

**Sharing of loss by default in contribution**

If any one of two or more joint promisers makes default in such contribution, the remaining joint promisers must bear the loss arising from such default in equal shares.

*Explanation.*—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

*Illustrations*

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

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\* These words were substituted for the original word "one" by the Repealing and Amending Act, 1891 (XII of 1891), as modified up to 31st May, 1902.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

### **Effect of release of one joint promiser**

44. Where two or more persons have made a joint promise, a release of one of such joint promisers by the promisee does not discharge the other joint promiser or joint promisers; neither does it free the joint promiser so released from responsibility to the other joint promiser or joint promisers §

### **Devolution of joint rights**

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.†

#### *Illustration*

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

### ***Time and Place for Performance***

#### **Time for performance of promise where no application is to be made and no time specified**

46. Where, by the contract, a promiser is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

*Explanation.*—The question "what is a reasonable time" is, in each particular case, a question of fact.

#### **Time and place for performance of promise where time is specified and no application to be made**

47. When a promise is to be performed on a certain day, and the promiser has undertaken to perform it without application by the

§ See s. 138, *infra*.

† For an exception to s. 45 in case of Government securities, see the Indian Securities Act, 1886 (XIII of 1886), s. 5 [General Acts, Vol. V].

promisee, the promiser may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

#### *Illustration*

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

#### **Application for performance on certain day to be at proper time and place**

48. When a promise is to be performed on a certain day, and the promiser has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

*Explanation*—The question "what is a proper time and place" is, in each particular case, a question of fact.

#### **Place for performance of promise where no application to be made and no place fixed for performance**

49. When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promiser to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

#### *Illustration*

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

#### **Performance in manner or at time prescribed or sanctioned by promisee**

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

#### *Illustrations*

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A describes B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

*Performance of Reciprocal Promises*

**Promiser not bound to perform, unless reciprocal promise ready and willing to perform**

51. When a contract consists of reciprocal promises to be simultaneously performed, no promiser need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

*Illustrations*

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

**Order of performance of reciprocal promises**

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

*Illustrations*

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

**Liability of party preventing event on which contract is to take effect**

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation\* from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

\* See s. 73 *infra*.

*Illustrations*

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

**Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises**

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promiser of the promise last mentioned fails to perform it, such promiser cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

*Illustrations*

(a) A hires B's ship to take in and convey, from Calcutta to Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

**Effect of failure to perform at fixed time, in contract in which time is essential**

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.

**Effect of such failure when time is not essential**

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by

the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promiser for any loss occasioned to him by such failure.

### **Effect of acceptance of performance at time other than that agreed upon**

If, in case of a contract voidable on account of the promiser's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promiser of his intention to do so \*

### **Agreement to do impossible act**

56. An agreement to do an act impossible in itself is void

### **Contract to do act afterward, becoming impossible or unlawful**

A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promiser could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. §

### **Compensation for loss through non-performance of act known to be impossible or unlawful**

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promiser must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise

#### *Illustrations*

(a) A agreed with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law in which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

\* Compare ss. 62 and 63, *infra*.

§ But see s. 65, *infra*. And see the Specific Relief Act, 1877 (I of 1877), s. 13, as modified up to 1st February 1904.

**Reciprocal promise to do thing legal, and also other things illegal**

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract but the second is a void agreement.

*Illustrations*

A and B agree that A shall sell B a house for 10,000 rupees, but that if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement

**Alternative promise, one branch being illegal**

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

*Illustrations*

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a void contract to deliver rice, and void agreement as to the opium.

*Appropriation of Payments***Application of payment where debt to be discharged is indicated**

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt the payment, if accepted, must be applied accordingly

*Illustrations*

(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B, 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B among other debts the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment

**Application of payment where debt to be discharged is not indicated**

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

### Application of payment where neither party appropriates

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

### Contracts which need not be performed

#### Effect of novation, rescission and alteration of contract

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed

#### Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,00 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B, 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into

#### Promisee may dispense with or remit performance of promise

63. Every promisee<sup>\*</sup> may dispense with or remit wholly or in part, the performance of the promise made to him, or may extend the time for such performance,<sup>†</sup> or may accept instead of it any satisfaction which he thinks fit

#### Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.<sup>†</sup>

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

<sup>\*</sup> But see s. 135, *infra*.

<sup>†</sup> See s. 41, *supra*.



(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a (composition)§ of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

### Consequences of rescission of voidable contract

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promiser. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.†

### Obligation of person who has received advantage under void agreement or contract that becomes void

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

### *Illustrations*

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the 1st of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre and B in consequence rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

### Mode of communicating or revoking rescission of voidable contract

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.\*

§ "Composition" was substituted for "compensation" by Act XII of 1901, s. 2 as modified up to 31st May 1902.

† See s. 75, *infra*.

\* See ss. 3 and 5, *supra*.

**Effect of neglect of promisee to afford promisor reasonable facilities for performance**

87. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

*Illustration*

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

**CHAPTER V**

**OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT**

**Claim for necessaries supplied to person incapable of contracting, or on his account**

88. If a person, incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person

*Illustrations*

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property

**Reimbursement of person paying money due by another in payment of which he is interested**

89. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other

*Illustration*

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

**Obligation of person enjoying benefit of non-gratuitous act**

90. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to

make compensation to the former in respect of, or to restore, the thing so done or delivered.\*

*Illustrations*

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property by fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

**Responsibility of finder of goods**

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.‡

**Liability of person to whom money is paid, or thing delivered, by mistake or under coercion**

72. A person to whom money has been paid, or anything delivered, by mistake or under coercion,† must repay or return it.

*Illustrations*

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

**CHAPTER VI**

**OF THE CONSEQUENCES OF BREACH OF CONTRACT**

**Compensation for loss or damage caused by breach of contract**

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

\* As to suits by minors under s. 70 in Presidency Small Causes Courts, see the Presidency Small Causes Courts Act, 1882 (XV of 1882), s. 32, as modified up to 1st June, 1908.

‡ See ss. 151 and 152, *infra*. As to definition of "bailee" see s. 148, *infra*.

† For definition of "coercion," see s. 15, *supra*.

### Compensation for failure to discharge obligation resembling those created by contract

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

*Explanation.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

### Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the 1st of January, a cargo which A is to provide and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some unavoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the 1st of January, for a certain price. Freight rises, and on the first of January,

the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the 1st of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and deliver it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered, at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the 1st of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the 1st of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of re-building the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not

receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the 1st of January, at a certain price. B afterwards, before the 1st of January, contracts to sell the saltpetre to C at a price higher than the market price of the 1st of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the 1st of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the 1st of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the 1st of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the 1st of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

#### Compensation for breach of contract where penalty stipulated for

74. \*When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

*Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

*Exception.*—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions

\* These paragraphs were substituted for the first para. of s. 74, by the Indian Contract Act, Amendment Act, 1899 (VI of 1899), s. 4.

of any law, or under the orders of the Central Government or of any Provincial Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

*Explanation.*—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested

#### Illustrations

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

\* (d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

\* (e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

\* (f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalments, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

\* (g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40 with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

#### Party rightfully rescinding contract entitled to compensation

75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the nonfulfilment of the contract.

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\*Illustrations (d), (e), (f) and (g) were inserted by the Indian Contract Act, Amendment Act, 1930 (VI of 1930), s. 4 (2).

*Illustration*

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

(Chapter VII on Sale of Goods is repealed by Indian Sale of Goods Act, III of 1930.)

## CHAPTER VIII

### OF INDEMNITY AND GUARANTEE

#### "Contract of indemnity" defined

124. A contract by which one party promises to save the other from loss to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

*Illustration*

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

#### Rights of indemnity holder when sued

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor:—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

#### "Contract of guarantee," "surety," "principal debtor," and "creditor"

126. A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety," the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

#### Consideration for guarantee

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.



*Illustrations*

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

**Surety's liability**

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

*Illustration*

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

**"Continuing guarantee"**

129. A guarantee which extends to a series of transactions is called a "continuing guarantee".

*Illustrations*

(a) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B, to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

**Revocation of continuing guarantee**

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions by notice to the creditor.

*Illustrations*

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for

C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

### **Revocation of continuing guarantee by surety's death**

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

### **Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default**

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

#### *Illustration*

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

### **Discharge of surety by variance in terms of contract**

133. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor\* and the creditor, discharges the surety as to transactions subsequent to the variance.

#### *Illustrations*

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for

\* The word "debtor" was inserted by Act XXIV of 1917.

moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st of March.

### **Discharge of surety by release or discharge of principal debtor**

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.\*

#### *Illustrations*

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

### **Discharge of surety when creditor compounds with, gives time to or agrees not to sue principal debtor**

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

### **Surety not discharged when agreement made with third person to give time to principal debtor**

136. Where a contract to give time to the principal debtor is made by the creditor with a third person and not with the principal debtor, the surety is not discharged.

\* See ss. 39, 53, 54, 55, 62, 63, 67, 118, 120, *supra*.

*Illustration*

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

**Creditor's forbearance to sue does not discharge surety**

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety

*Illustration*

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

**Release of one co-surety does not discharge others**

138. Where there are co-sureties, a release by the creditors of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.\*

**Discharge of surety by creditor's act or omission impairing surety's eventual remedy**

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

*Illustrations*

(a) B contracts to build a ship for C for a given sum to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.†

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

**Rights of surety on payment or performance**

140. Where a guarantee debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the

\* See s. 144, *supra*.

† See s. 133, *supra*.

surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

### **Surety's right to benefit of creditor's securities**

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.\*

#### *Illustrations*

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

### **Guarantee obtained by misrepresentation invalid**

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent concerning a material part of the transaction, is invalid.

### **Guarantee obtained by concealment invalid**

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

#### *Illustrations*

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

### **Guarantee on contract that creditor shall not act on it until co-surety joins**

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.†

\* See s. 139, *supra*.

† See s. 33, *supra*.

### **Implied promise to indemnify surety**

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

#### *Illustrations*

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

### **Co-sureties liable to contribute equally**

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt or of that part of it which remains unpaid by the principal debtor. §

#### *Illustrations*

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

### **Liability of co-sureties bound in different sums**

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

§ See s. 43, *supra*.

*Illustrations*

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

## CHAPTER IX

## OF BAILMENT

**"Bailment," "bailor," and "bailee" defined**

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

*Explanation.*—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they have not been delivered by way of bailment.

**Delivery to bailee—how made**

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

**Bailor's duty to disclose faults in goods bailed**

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

*Illustrations*

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

**Care to be taken by bailee**

\* 151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. §

**Bailee when not liable for loss, etc., of thing bailed**

§152. The bailor, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

**Termination of bailment by bailee's act inconsistent with conditions**

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

*Illustration*

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. Thus is, at the option of A, a termination of the bailment.

**Liability of bailee making unauthorized use of goods bailed**

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to goods from or during such use of them.

*Illustrations*

(a) A lends a horse to B for his own riding only. B allows C, a member of his family to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

**Effect of mixture, with bailor's consent, of his goods with bailee's**

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

\* The responsibility of the Madras Harbour Trust Board in regard to animals or goods has been declared to be that of a bailee, under these sections, without the qualifying words "in the absence of any special contract" in s. 152, see s. 41 (1) of the Madras Harbour Trust Act, 1905 (Mad. Act. 2 of 1905).

§ As to railway contracts, see the Indian Railways Act, 1890 (IX of 1890), s. 72, in the revised edition, as modified up to 1st June, 1905. As to the liability of common carriers, see s. 8 of the Carriers Act, 1865 (III of 1865), revised edition as modified up to 31st May 1905.



**Effect of mixture, without bailor's consent, when the goods can be separated**

154. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

*Illustration*

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

**Effect of mixture without bailor's consent, when the goods cannot be separated**

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

*Illustration*

A bails a barrel of Cape flour worth Rs 45 to B. B, without A's consent, mixes the flour with country flour of his own worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

**Repayment by bailor of necessary expenses**

158. Where, by the conditions of the bailment the goods are to be kept or to be carried or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

**Restoration of goods lent gratuitously**

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

**Return of goods bailed on expiration of time or accomplishment of purpose**

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.\*

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\* But see ss. 24, 152, *supra*, and 170, *infra*.

### **Bailee's responsibility when goods are not duly returned**

§161. If by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.†

### **Termination of gratuitous bailment by death**

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

### **Bailor entitled to increase or profit from goods bailed**

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

#### *Illustration*

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

### **Bailor's responsibility to bailee**

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

### **Bailment by several joint owners**

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary.

### **\* Bailee not responsible on re-delivery to bailor without title**

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.‡

### **Right of third person claiming goods bailed**

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

### **Right of finder of goods ; may sue for specific reward offered**

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner, but he may retain the goods against the owner until he receives such compensation ; and,

§ S. 161 has been declared to apply to the responsibility of the Madras Harbour Trust Board as to animals and goods in their possession, see Madras Harbour Trust Act, 1905 (Mad. Act 2 of 1905).

† As to railway contracts, see the Indian Railways Act, 1880 (IX of 1880), s. 72, as modified up to 1st June, 1905.

‡ See s. 117 of the Indian Evidence Act, 1872 (I of 1872), as modified up to 1st September 1906.

where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

### **When finder of thing commonly on sale may sell it**

169. When a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence, be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

### **Bailee's particular lien**

170. When the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

#### *Illustrations*

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make a coat. B promises A to deliver the coat as soon as it is finished and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

### **General lien of bankers, factors, wharfingers, attorneys and policy-brokers**

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.\*

#### *Bailment of Pledges*

### **"Pledge," "pawnor" and "pawnee" defined**

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

### **Pawnee's right of retainer**

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the

\* As to lien of an agent, see s. 221, *infra*. As to lien of Railway Administrations, see the Indian Railways Act, 1890 (IX of 1890), s. 55 as modified up to 1st June 1905.

interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

**Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances**

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

**Pawnee's right as to extraordinary expenses incurred**

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

**Pawnee's right where pawnor makes default**

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise 3 years from making of loan or breach of promise in respect of which the goods were pledged, the pawnee may bring a suit\* against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

**Defaulting pawnor's right to redeem**

177. If a time is stipulated for the payment of the debt, or performance of the promise for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time§ before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

**Pledge by mercantile agent**

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

\* Within three years from the making of the loan or the breach of the promise—see the Indian Limitation Act, 1877 (XV of 1877), Sch. 11, Nos. 57 and 115. For Act XV of 1877, see the revised edition, as modified up to 31st December, 1900.

§ For limitation, see the Indian Limitation Act, 1877 (XV of 1877), Sch. 11, No. 145. For Act XV of 1877, see the revised edition, as modified up to 31st December 1900.

**Explanation.**—In this section the expression, “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

### **Pledge by person in possession under voidable contract**

178A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

### **Pledge where pawnor has only a limited interest**

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

### *Suits by Bailors or Bailees against Wrong-doers*

#### **Suit by bailor or bailee against wrong-doer**

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

#### **Apportionment of relief or compensation obtained by such suits**

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

## **CHAPTER X**

### **AGENCY**

#### *Appointment and Authority of Agents*

#### **“Agent” and “principal” defined**

182. An “agent” is a person employed to do any act for another\* or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal”.

#### **Who may employ agent**

183. Any person who is of the age of majority according to the law to which he is subject and who is of sound mind, may employ an agent.†

\* Cf. s. 225, *infra*. As to effect of an agent's fraud, see s. 17, *supra*, and s. 238, *infra*.

† Cf. s. 11, *supra*.

**Who may be an agent**

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal according to the provisions in that behalf herein contained.

**Consideration not necessary**

185. No consideration is necessary to create an agency.

**Agent's authority may be expressed or implied**

186. The authority of an agent may be expressed or implied.†

**Definitions of express and implied authority**

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

*Illustration*

A owns a shop in Seranipur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

**Extent of agent's authority**

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

*Illustrations*

(a) A is employed by B residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A constitutes B, his agent, to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

**Agent's authority in an emergency**

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done, by a person of ordinary prudence, in his own case, under similar circumstances.\*

† But see s. 33 of the Indian Registration Act, 1877 (III of 1877), revised edition, as modified up to 1st August 1905. See also s. 39 of the Code of Civil Procedure (Act XIV of 1882), as modified up to 1st December 1899.

\* But see s. 214, *infra*.

*Illustrations*

- (a) An agent for sale may have goods repaired if it be necessary.  
 (b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

*Sub-Agents***When agent cannot delegate**

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency a sub-agent must, be employed.

**"Sub-agent" defined**

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

**Representation of principal by sub-agent properly appointed**

192. Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

**Agent's responsibility for sub-agent**

The agent is responsible to the principal for the acts of the sub-agent.

**Sub-agent's responsibility**

The sub-agent is responsible for his acts to the agent but not to the principal, except in case of fraud or wilful wrong.

**Agent's responsibility for sub-agent appointed without authority**

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

**Relation between principal and person duly appointed by agent to act in business of agency**

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

*Illustrations*

- (a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

§ Unless he ratifies them—see s. 196, *infra*.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C and Co. B instructs D, a solicitor, to take legal proceedings against C and Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

#### **Agent's duty in naming such person**

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does thus he is not responsible to the principal for the acts or negligence of the agent so selected.

#### *Illustrations*

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

#### *Ratification*

#### **Right of person as to acts done for him without his authority. Effect of ratification**

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

#### **Ratification may be expressed or implied**

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

#### *Illustrations*

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account, B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

#### **Knowledge requisite for valid ratification**

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

#### **Effect of ratifying unauthorized act forming part of a transaction**

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.



**Ratification of unauthorized act cannot injure third person**

200. An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

*Illustrations*

(a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from S, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B so as to be binding on A.

*Revocation of Authority***Termination of Agency**

201. An agency is terminated by the principal revoking his authority; or by the agent announcing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any act for the time being in force for the relief of insolvent debtors.\*

**Termination of agency where agent has an interest in subject-matter**

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interests.

*Illustrations*

(a) A gives authority to B to sell A's land, and to pay himself out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

**When principal may revoke agent's authority**

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

\* As to the law in force in Presidency towns, see the Indian Insolvency Act (11 & 12 Vict., c. 21), [Collection of Statutes relating to India, Ed. 1899, p. 228]. As to the rest of British India, see the Code of Civil Procedure (Act XIV of 1882), Ch. XX, as modified up to 1st December 1899.

**Revocation where authority has been partly exercised**

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

*Illustrations*

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to buy for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton

**Compensation for revocation by principal or renunciation by agent**

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation\* to the agent or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

**Notice of revocation or renunciation**

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other

**Revocation and renunciation may be expressed or implied**

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

*Illustration*

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

**When termination of agent's authority takes effect as to agent, and as to third persons**

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

*Illustrations*

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before

\* See s. 73, *supra*.

he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, afterwards receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies and D takes out probate to his will. B after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

### **Agent's duty on termination of agency by principal's death or insanity**

209. When an agency is terminated by the principal dying or becoming of unsound mind the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him

### **Termination of sub-agent's authority**

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

### *Agent's Duty to Principal*

#### **Agent's duty in conducting principal's business**

211. An agent is bound to conduct the business of his principal according to the directions given by the principal,\* or in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

#### *Illustrations*

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

### **Skill and diligence required from agent**

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in

\* But see s. 189, *supra*.

similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

#### *Illustrations*

(a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

#### **Agent's accounts**

213. An agent is bound to render proper accounts to his principal on demand.

#### **Agent's duty to communicate with principal**

214. It is the duty of an agent in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions\*.

#### **Right of principal when agent deals, on his own account, in business of agency without principal's consent**

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the

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\* See s. 189, *supra*.

transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

### Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

### Principal's right to benefit gained by agent dealing on his own account in business of agency

216. If an agent without the knowledge of his principal, deals in the business of the agency, on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

### Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

### Agent's right of retainer out of sums received on principal's account

217. An agent may retain,† out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

### Agent's duty to pay sums received for principal

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

### When agent's remuneration becomes due

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain moneys received by him on account of goods sold although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

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† See s. 221, *infra*.

### Agent not entitled to remuneration for business misconducted

220. An agent who is guilty of misconduct in the business of the agency<sup>§</sup> is not entitled to any remuneration in respect of that part of the business which he has misconducted.

#### Illustrations

(a) A employed B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to A.

(b) A employs B to recover 1000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, but must make good the loss.

### Agent's Lien on Principal's Property

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.\*

#### Principal's Duty to Agent

### Agent to be indemnified against consequences of lawful acts

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

#### Illustrations

(a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

### Agent to be indemnified against consequences of acts done in good faith

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify

<sup>§</sup> See ss. 195, 211, 212, 213, 214 and 218, *supra*.

\* As to the general lien of an agent who is a banker, factor, attorney or policy-broker, see s. 171, *supra*.

the agent against the consequences of that act, though it causes an injury to the rights of third persons.

#### *Illustrations*

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for he has been compelled to pay to C and for B's own expenses.

#### **Non-liability of employer of agent to do a criminal act**

224. Where one person employs another to do an act, which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.\*

#### *Illustrations*

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

#### **Compensation to agent for injury caused by principal's neglect**

225. The principal must make compensation to his agent in respect of injury<sup>s</sup> caused to such agent by the principal's neglect or want of skill.

#### *Illustration*

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is, in consequence, hurt. A must make compensation to B.

#### *Effect of Agency on Contract with third persons*

#### **Enforcement and consequences of agent's contracts**

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same

\* See s. 24, *supra*.

§ Cf. the Indian Fatal Accidents Act, 1855 (XIII of 1855). [General Acts, Vol. I, Ed. 1898.]

manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

*Illustrations*

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

**Principal how far bound when agent exceeds authority**

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal

*Illustration*

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

**Principal not bound when excess of agent's authority is not separable**

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

*Illustration*

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

**Consequences of notice given to agent**

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

*Illustrations*

(a) A is employed by B to buy from C certain goods of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.



(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

**Agent cannot personally enforce, nor be bound by contracts on behalf of principal**

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered by him on behalf of his principal, nor is he personally bound by them.

**Presumption of contract to contrary**

Such a contract shall be presumed to exist in the following cases :—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;
- (2) where the agent does not disclose the name of his principal ;
- (3) where the principal, though disclosed, cannot be sued

**Rights of parties to a contract made by agent not disclosed**

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

**Performance of contract with agent supposed to be principal**

232. Where one man makes a contract with another neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

#### *Illustration*

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

**Right of person dealing with agent personally liable**

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

*Illustration*

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

**Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable**

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

**Liability of pretended agent**

235. A person untruly<sup>\*</sup> representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

**Person falsely contracting as agent not entitled to performance**

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

**Liability of principal inducing belief that agent's unauthorized acts were authorized**

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

*Illustrations*

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

**Effect on agreement of misrepresentation or fraud by agent**

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals;§ but misrepresentations made or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals,

<sup>\*</sup> See s. 208, *supra*.

§ See s. 230, *supra*.

*Illustrations*

(a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

(Chapter XI of Partnership covering Ss 239 to 266 was repealed by Indian Partnership Act, IX of 1932 )

some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

### Sale of unascertained goods and appropriation

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

### Delivery to carrier

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

### Goods sent on approval or "on sale or return"

24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

### Reservation of right of disposal

25. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract, or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

### Risk 'prima facie' passes with property

26. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the

property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

### *Transfer of Title*

#### **Sale by person — not the owner**

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his of sale notice that the seller has not authority to sell.

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

#### **Sale by one of joint owners**

28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell

#### **Sale by person in possession under voidable contract. (IX of 1872)**

29. When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

#### **Seller or buyer in possession after sale**

30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents

of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

## CHAPTER IV

### PERFORMANCE OF THE CONTRACT

#### Duties of seller and buyer

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

#### Payment and delivery are concurrent conditions

32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

#### Delivery

33. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf.

#### Effect of part delivery

34. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

#### Buyer to apply for delivery

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

#### Rules as to delivery

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall effect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

### Delivery of wrong quantity

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

### Instalment deliveries

38. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

### Delivery to carrier or wharfinger

39. (1) Where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the

buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

#### **Risk where goods are delivered at distant place**

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

#### **Buyer's right of examining the goods**

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

#### **Acceptance**

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

#### **Buyer not bound to return rejected goods**

43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

#### **Liability of buyer for neglecting or refusing delivery of goods**

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods :

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.



**CHAPTER V****RIGHTS OF UNPAID SELLER AGAINST THE GOODS****"Unpaid seller" defined**

45. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

- (a) when the whole of the price has not been paid or tendered ;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignee or agent who has himself paid, or is directly responsible for, the price.

**Unpaid seller's rights**

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) a lien on the goods for the price while he is in possession of them ;
- (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;
- (c) a right of re-sale as limited by this Act

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

***Unpaid Seller's Lien*****Seller's lien**

47. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

- (a) where the goods have been sold without any stipulation as to credit ;
- (b) where the goods have been sold on credit, but the term of credit has expired ;
- (c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

**Part delivery**

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

## CHAPTER VI

### SUITS FOR BREACH OF THE CONTRACT

#### Suit for price

55. (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

#### Damages for non-acceptance

56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

#### Damages for non-delivery

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

#### Specific performance (I of 1877)

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

#### Remedy for breach of warranty

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

**Repudiation of contract before due date**

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

**Interest by way of damages and special damages**

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price--

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made.

**CHAPTER VII****MISCELLANEOUS****Exclusion of implied terms and conditions**

62. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

**Reasonable time—a question of fact**

63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

**Auction sale**

64. In the case of a sale by auction—

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid;

(3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction;

(4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;

(5) the sale may be notified to be subject to a reserved or upset price ;

(5) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

### **Repeal**

65. Chapter VII of the Indian Contract Act, 1872, is hereby repealed.

### **Savings**

66. (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect—

(a) any right, title, interest, obligation or liability already acquired, accrued, or incurred before the commencement of this Act, or

(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

**APPENDIX IV**  
**THE**  
**INDIAN PARTNERSHIP ACT, 1932**  
**(ACT IX OF 1932)**

*(Passed by the Indian Legislature)*

*(Received the Assent of the Governor-General on the  
8th April 1932)*

**An Act to define and amend the law relating to partnership**

**WHEREAS** it is expedient to define and amend the law relating to partnership, It is hereby enacted as follows —

**CHAPTER I**

**PRELIMINARY**

**Short title, extent and commencement**

1. (1) This Act may be called the Indian Partnership Act, 1932
- (2) It extends to the whole of British India, including British Baluchistan and the Santhal Paraganas
- (3) It shall come into force on the 1st day of October, 1932, except Section 69, which shall come into force on the 1st day of October, 1933.

**Definitions**

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) an “act of a firm” means any act or omission by all the parties, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm,
- (b) “business” includes every trade, occupation and profession;
- (c) “prescribed” means prescribed by rules made under this Act,
- (d) “third party” used in relation to a firm or to a partner therein means any person who is not a partner in the firm; and

**(IX of 1872)**

- (e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

**Application of provisions of Act IX of 1872 (IX of 1872)**

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

**CHAPTER II**

**THE NATURE OF PARTNERSHIP**

**Definition of "partnership", "partner", "firm" and "firm name"**

4. "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name".

**Partnership not created by status**

5. The relation of partnership arises from contract and not from status:

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

**Mode of determining existence of partnership**

6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

*Explanation 1.*—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

*Explanation 2.*—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business; and in particular, the receipt of such share or payment—

- (a) by a lender of money to persons engaged or about to engage in any business.
- (b) by a servant or agent, as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part-owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

**Partnership at will**

7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".

**Particular partnership**

8. A person may become a partner with another person in particular adventures or undertakings.

**CHAPTER III****RELATIONS OF PARTNERS TO ONE ANOTHER****General duties of partners**

9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative

**Duty to indemnify for loss caused by fraud**

10. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

**Determination of rights and duties of partners by contract between the partners**

11. (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing

**Agreements in restraint of trade**

(2) Notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

**The conduct of the business**

12. Subject to contract between the partners—

(a) every partner has a right to take part in the conduct of the business ;

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with business may be decided by a majority of the partners and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

**Mutual rights and liabilities****13. Subject to contract between the partners—**

- (a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;
- (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;
- (c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;
- (d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum ;
- (e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him --
  - (i) in the ordinary and proper conduct of the business, and
  - (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances, and
- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

**The property of the firm**

14. Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

**Application of the property of the firm**

15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

**Personal profits earned by partners****16. Subject to contract between the partners,—**

- (a) if a partner derives any profits for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;
- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.



**Rights and duties of partners after a change in the firm**

17. Subject to contract between the partners,—

- (a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be ;

after the expiry of the term of the firm, and

- (b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

where additional undertakings are carried out

- (c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings

**CHAPTER IV****RELATIONS OF PARTNERS TO THIRD PARTIES**

**Partner to be agent of the firm**

18. Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

**Implied authority of partner as agent of the firm**

19. (1) Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

- (a) submit a dispute relating to the business of the firm to arbitration,
- (b) open a banking account on behalf of the firm in his own name,
- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceedings against the firm,
- (f) acquire immovable property on behalf of the firm,
- (g) transfer immovable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

**Extension and restriction of partner's implied authority**

20. The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

**Partner's authority in an emergency**

21. A partner has authority, in any emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

**Mode of doing act to bind firm**

22. In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

**Effect of admissions by a partner**

23. An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

**Effect of notice to acting partner**

24. Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

**Liability of a partner for acts of the firm**

25. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

**Liability of the firm for wrongful acts of a partner**

26. Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

**Liability of firm for misapplication by partners**

27. Where—

- (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or
- (b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss

**Holding out**

28. (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) When after a partner's death the business is continued in the old firm ~~name~~, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

**Rights of transferee of a partner's interest**

29. (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved, or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

**Minors admitted to the benefits of partnership**

30. (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right in such share of the property and of the profits of the firm as may be agreed upon and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in Section 48:

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public

notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice.

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of Section 28.

## CHAPTER V

### INCOME AND OUTGOING PARTNER.

#### Introduction of a partner

31. (1) Subject to contract between the partners and to the provisions of Section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners

(2) Subject to the provisions of Section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner

#### Retirement of a partner

32. (1) A partner may retire—

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an

agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

### Expulsion of a partner

33. (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners

(2) The provisions of sub-sections (2), (3) and (4) of Section 32 shall apply to an expelled partner as if he were a retired partner.

### Insolvency of a partner

34. (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

### Liability of estate of deceased partner

35. Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

### Rights of outgoing partner to carry on competing business

36. (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

### Agreements in restraint of trade (IX of 1872)

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

### **Right of outgoing partner in certain cases to share subsequent profits**

37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm.

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and that option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate, as the case may be is not entitled to any further or other share of profits, but if any partner assuming to act in exercise of the option does not in all material respect comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

### **Revocation of continuing guarantee by change in firm**

38. A continuing guarantee given to a firm or to a third party in respect of the transactions of a firm is in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

## **CHAPTER VI**

### **DISSOLUTION OF A FIRM**

#### **Dissolution of a firm**

39. The dissolution of a partnership between all the partners of a firm is called the 'dissolution of the firm'.

#### **Dissolution by agreement**

40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

#### **Compulsory dissolution**

41. A firm is dissolved

- (a) by the adjudication of all the partners or of all the partners but one as insolvent, or
- (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership.

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

**Dissolution on the happening of certain contingencies**

42. Subject to contract between the partners, a firm is dissolved—

- (a) if constituted for a fixed term, by the expiry of that term ;
- (b) if constituted to carry out one or more adventures or undertakings by the completion thereof ;
- (c) by the death of a partner ; and
- (d) by the adjudication of a partner as an insolvent.

**Dissolution by notice of partnership at will**

43. (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm ;

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or if no date is so mentioned, as from the date of the communication of the notice

**Dissolution by the Court**

44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;

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(e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land revenue or of any dues recoverable as arrears of land revenue due by the partner ;

(f) that the business of the firm cannot be carried on save at a loss ; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

**Liability for acts of partners done after dissolution**

45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any

of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution

Provided that the estate of a partner who dies or who is adjudicated an insolvent or of a partner who not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner

(2) Notices under sub-section (1) may be given by any partner

**Right of partners to have business wound up after dissolution**

46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights

**Continuing authority of partners for purposes of winding up**

47. After the dissolution of a firm the authority of each partner to bind the firm and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution but not otherwise

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent

**Mode of settlement of accounts between partners**

48. In settling the accounts of a firm after dissolution the following rules shall subject to agreement by partners be observed

- (a) Losses including deficiencies of capital shall be paid first out of profits, next out of capital and lastly if necessary, by the partners individually in the proportions in which they were entitled to share profits
- (b) The assets of the firm including any sums contributed by the partners to make up deficiencies of capital shall be applied in the following manner and order —
  - (i) in paying the debts of the firm to third parties,
  - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;
  - (iii) in paying to each partner rateably what is due to him on account of capital and
  - (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.



**Payment of firm's debts and of separate debts**

49. Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

**Personal profits earned after dissolution**

50. Subject to contract between the partners, the provisions of clause (a) of Section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm nothing in this section shall affect his right to use the firm name

**Return of premium on premature dissolution**

51. Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the time upon which he became a partner and to the length of time during which he was a partner, unless—

- (a) the dissolution is mainly due to his own misconduct, or
- (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

**Rights where partnership contract is rescinded for fraud or misrepresentation**

52. Where a contract creating partnership is rescinded on the ground of fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

- (a) to a lien on or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;
- (b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm, and
- (c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

**Right to restrain from use of firm name or firm property**

53. After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary,

restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit until the affairs of the firm have been completely wound up.

Provided that where any partner or his representative has bought the goodwill of the firm within a time specified in this section shall affect his right to use the firm name.

#### Agreements in restraint of trade (18 of 1872)

54 Partners may upon or after dissolution of the firm make an agreement that one or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits and notwithstanding anything contained in section 27 of the Indian Contract Act 1872 such agreement shall be valid if the restrictions imposed are reasonable.

#### Sale of goodwill after dissolution

55 (1) In settling the account of a firm after dissolution, the goodwill shall subject to any agreement between the partners be included in the assets, and it may be sold separately or along with other property of the firm.

#### Rights of buyer and seller of goodwill

(2) Where the goodwill of a firm is sold after dissolution a partner may carry on business competing with that of the buyer and he may advertise such business subject to any agreement between him and the buyer but he may not—

- (a) use the firm name;
- (b) represent himself as connected with the business of the firm,
- (c) solicit the custom of persons who were dealing with the firm before its dissolution.

#### Agreements in restraint of trade (18 of 1872)

(3) Any partner may upon or after the dissolution of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits and notwithstanding anything contained in section 27 of the Indian Contract Act 1872 such agreement shall be valid if the restrictions imposed are reasonable.

## CHAPTER VII

### REGISTRATION OF FIRMS

#### Power to exempt from application of this Chapter

56 The Provincial Government of any Province may, by notification in the official Gazette direct that the provisions of this Chapter shall not apply to that province or to any part thereof specified in the notification.

#### Appointment of Registrars

57. (1) The Provincial Government may appoint Registrars of Firms for the purposes of this Act and may define the areas within which they shall exercise their powers and perform their duties.

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(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

**Application for registration**

58. (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

- (a) the firm name,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners,
- (f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorized in this behalf

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely:—

“Crown”, “Emperor”, “Empress”, “Empire”, “Imperial”, “King”, “Queen”, “Royal”, or words expressing or implying the sanction, approval or patronage of the Crown or the Central Government or any Provincial Government or the Crown Representative except when the Provincial Government signifies its consent to the use of such words as part of the firm name by order in writing.

**Registration**

59. When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

**Recording of alterations in firm name and principal place of business**

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a settlement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 58.

**Noting of closing and opening of branches**

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its

principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

### **Noting of changes in names and addresses of partners**

62. When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61

### **Recording of changes in and dissolution of a firm**

63. (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorized in this behalf, may give notice to the Registrar of such change or dissolution specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59

### **Recording of withdrawal of a minor**

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorized in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

### **Rectification of mistakes**

64. (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

### **Amendment of Register by order of Court**

65. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision: and the Registrar shall amend the entry accordingly.

### **Inspection of Register and filed documents**

66. (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

### Grant of copies

87. The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed a copy certified under his hand of any entry or portion thereof in the Register of Firms

### Rules of evidence

88. (1) Any statement intimation or notice recorded or noted in the Register of Firms shall as against any person by whom or on whose behalf such statement intimation or notice was signed, be conclusive proof of any fact therein stated

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement intimation or notice recorded or noted therein

### Effect of non-registration

89 (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person who is a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the person suing are or have been shown in the Register of Firms as partners in the firm

(3) The provision of sub sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for account of a dissolved firm or any right or power to realize the property of a dissolved firm, or

(III of 1909, V of 1920)

(b) the power of an official assignee receiver or Court under the Presidency-towns Insolvency Act 1909 or the Provincial Insolvency Act 1920 to realize the property of an insolvent partner

(4) This section shall not apply

(a) to firms or to partners in firms which have no place of business in British India or whose places of business in British India are situated in areas to which by notification under section 56 this Chapter does not apply, or

(XV of 1882 IX of 1887)

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Causes Courts Act 1882 or outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Causes Courts Act 1877, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim

### **Penalty for furnishing false particulars**

70. Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

### **Power to make rules**

71. (1) The Provincial Government may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms:

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The Provincial Government may also make rules—

- (a) prescribing the form of statement submitted under section 58, and of the verification thereof;
- (b) requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof;
- (c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein;
- (d) regulating the procedure of the Registrar when disputes arise;
- (e) regulating the filing of documents received by the Registrar;
- (f) prescribing conditions for the inspection of original documents;
- (g) regulating the grant of copies;
- (h) regulating the elimination of registers and documents;
- (i) providing for the maintenance and form of an Index to the Register of Firms; and
- (j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

## **CHAPTER VIII**

### **SUPPLEMENTAL**

### **Mode of giving public notice**

72. A public notice under this Act is given—

- (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become

a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

- (b) in any other case, by publication in the official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

### **Repeals**

72. The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof.

### **Savings**

Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to partnership not expressly repealed by this Act, or
- (e) any rule of insolvency relating to partnership, or
- (f) any rule of law not inconsistent with this Act.

**SCHEDULE I****MAXIMUM FEES**

[See sub-section (1) of section 71.]

Document or act in respect of which the fee is payable.	Maximum fee.
Statement under section 58 .. ..	Three rupees.
Statement under section 60 .. ..	One rupee.
Intimation under section 61 .. ..	One rupee.
Intimation under section 62 .. ..	One rupee.
Notice under section 63 .. ..	One rupee.
Application under section 64 .. ..	One rupee.
Inspection of the Register of Firms under sub-section (1) of section 66 .	Eight annas for inspecting one volume of the Register.
Inspection of documents relating to a firm under sub-section (2) of section 66 .	Eight annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms .	Four annas for each hundred words or part thereof.

**SCHEDULE II****ENACTMENT REPEALED**

(See section 73.)

Year 1	No. 2	Short title 3	Extent of repeal 4
1872	IX	The Indian Contract Act, 1872.	Exceptions 2 and 3 to section 27. The whole of Chapter XI.
1920	Burma Act VIII	The Burma Registration of Business Names Act, 1920.	The whole.





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